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No. 259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

On Appeal from the Supreme Court of the State of Ohio

KENNETH AGEE,

Appellant,

vs.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

JURISDICTIONAL STATEMENT

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On Appeal from the Supreme Court of the State of Ohio

KENNETH AGEE,

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Appellee.

JURISDICTIONAL STATEMENT

Appellant hereby appeals from the judgment of the Supreme Court of the State of Ohio made and entered on the 29th day of January, 1964. Said judgment overruled the objections of the appellant herein to the recommendations of the Board of Commissioners on Grievances and Discipline, and said judgment confirmed the report of said Board, and approved its recommendation and thereby suspended said appellant indefinitely from the practice of law in the State of Ohio. Appellant submits this Statment to show that the Supreme Court of the United States has jurisdiction of this appeal and that this appeal presents substantial Federal questions.

THE OPINIONS BELOW

The opinion of the Supreme Court of the State of Ohio is reported at 175 Ohio State Reports, pages 443 to 447, inclusive, and is set out in the Appendix hereto. The findings of fact, conclusions and recommendation of the Board of Commissioners on Grievances and Discipline are unreported and are set out in the Appendix hereto. The notice given in accordance with Section 19 of Rule XXVII of the Rules of Practice of the Supreme Court of Ohio may be considered to have been reported, for it appears at page 130 of the *Ohio Bar*, of February 10, 1964. The *Ohio Bar* is the publication of the Ohio State Bar Association. The said notice is set out in the appendix hereto.

JURISDICTION

The Board of Commissioners on Grievances and Discipline filed its findings of fact, conclusions and recommendation in the Supreme Court of the State of Ohio on May 13, 1963, to which the respondent, the appellant herein, filed objections pursuant to Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio. The judgment of the Supreme Court of the State of Ohio was made and entered on the 29th day of January, 1964, and by order of February 26, 1964, application for rehearing was denied. Notice of appeal was duly filed in the said Supreme Court of the State of Ohio on March 9, 1964. On May 8, 1964 an order was made and entered in the Supreme Court of the United States by which the time within which to docket the case and file the record on appeal was extended to and to include July 7, 1964. The jurisdiction of the Supreme Court of the United States to review on appeal the said judgment of the Supreme Court of the State of Ohio is conferred by Sections 1257 (2) and 2101 (c) of Title 28 of the United States Code. The following decisions of the

Supreme Court of the United States sustain the jurisdiction asserted. *Hamilton, et al.* v. *Regents of the University of California*, 293 U. S. 245, 79 L. Ed. 343, 55 S. Ct. 197 (December 3, 1934), rehearing denied, 293 U. S. 633, 79 L. Ed. 717, 55 S. Ct. 345; *Lathrop* v. *Donahue*, 367 U. S. 820, 6 L. Ed. 2d 1191, 81 S. Ct. 1826, petition for rehearing and for other relief denied, 368 U. S. 871, 7 L. Ed. 2d 172, 82 S. Ct. 23.

THE STATUTES INVOLVED

Rules XIV, Section 15, XXVII and XXVIII of the Rules of Practice of the Supreme Court of the State of Ohio are set out in the Appendix hereto. This appeal asserts that the amended (effective January 1, 1957) Rule XXVII exceeds constitutional limitations. Both Rules XXVII, before and after said amendment thereof, are set out in the Appendix hereto. Sections 2503.36, 2505.45, 4123.88, 4705.02, 4705.03, 4705.04 and 4705.08 of the Revised Code are properly to be considered and have been set out in the Appendix hereto because of their aggregate length. *Goodman et al* v. *Beall*, 130 O. S. 427, 200 N. E. 470, Supreme Court of Ohio, February 26, 1936, is set out in the Appendix hereto as a related case. Canons 26, 27, 28, 29, 34 and 35 of the Canons of Professional Ethics which the appellant was adjudged to have violated are deemed to have the force and effect of law in this context and are set out in the Appendix hereto. The Canons of Professional Ethics were adopted by the Supreme Court of the State of Ohio November 13, 1952.

THE QUESTIONS PRESENTED

By amendment of Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio, effective January 1, 1957, the procedure, as well as the grounds, for the discipline of attorneys at law was changed from that which had been prescribed theretofore by Sections 4705.02, 4705.03 and 4705.04 of the Revised Code of Ohio.

1. Within the limitations imposed by the Fourteenth Amendment to the Constitution of the United States, particularly the prohibition against abridgment of the privileges and immunities of a citizen of the United States by any State, can the State of Ohio omit from the definition of the grounds upon which an attorney at law may be disciplined the requirements of allegation and proof of moral turpitude?

2. Can the State of Ohio, within limitations imposed by the due process clause of the Fourteenth Amendment to the Constitution of the United States (a) abandon the requirement of "written charges", as provided for by Section 4705.03 of the Revised Code of the State of Ohio and substitute therefor a "written complaint alleging misconduct", as provided for in said Rule XXVII, Section 8? (b) change the requirement of proof of grounds for such discipline from that of clear and convincing evidence to that of a preponderance of the evidence?

3. Within limitations imposed by the due process clause of the Fourteenth Amendment to the Constitution of the United States, can a violation, or violations, of Canon 34 and Canon 35 of the Canons of Professional Ethics be predicated upon a rule of law which was pronounced for the first time in a judgment of the Supreme Court of the State of Ohio which is subsequent to the violation or viola-

tions charged so that retroactive operation is thereby given the changed rule of law in a matter both penal in nature and one which operates to compel a forfeiture? Does this *ex post facto* effect, given to the changed rule of law not run counter to the ban of Article I, Section 10, clause 1 of the Constitution of the United States?

4. Are not allegations of misconduct lacking in substance and, where pursued to severe discipline of an attorney at law, a denial of the equal protection of the laws within the intendment of the Fourteenth Amendment to the Constitution of the United States in the complete absence of a person aggrieved?

STATEMENT OF THE CASE

On July 28, 1962 a complaint was filed with the Board of Commissioners on Grievances and Discipline for the State of Ohio in which it was alleged that the respondent therein named, appellant herein, had been guilty of misconduct. The complaint contained no allegation of, nor charge of, moral turpitude in the commission of the acts said to constitute misconduct. There was no specification of persons as to whom, or with whom, there had been such misconduct. There was no complaint on the part of clients or others of loss or inconvenience resulting from the misconduct alleged, i. e., no person aggrieved. There were five separate allegations of misconduct:

I. Solicitations of professional employment, directly and indirectly, in violation of Sections 4123.88 and 4705.08 of the Revised Code of Ohio, the Canons of Professional Ethics and the Oath of Office taken upon admission to the practice of law.

II. Maintenance of an association with persons not admitted to the practice of law in the representation of claimants before the Industrial Commission of Ohio and the Bureau of Workmen's Compensation of the State of Ohio, with apportionment of fees between respondent and the persons not admitted to the practice of law in violation of Sections 4123.88 and 4705.08 of the Revised Code, the Canons of Professional Ethics and the said Oath of Office.

III. Delegation of legal responsibility to respondent's employees who had not been admitted to the practice of law in violation of the Canons of Professional Ethics and the Oath of Office.

IV. Maintenance of relations with persons not admitted to the practice of law which permitted their exploitation of respondent's professional services and professional name in violation of said Canons of Professional Ethics and the said Oath of Office.

V. Distribution of cards containing a schedule which showed in a readily understandable form rates of permanent partial disability awards, bearing respondent's

name, address, telephone number and designation as "Attorney at Law" constitated solicitation of professional employment in violation of Sections 4123.88 and 4705.08 of the Revised Code of Ohio, the said Canons of Professional Ethics, and the said Oath of Office.

The respondent's motion to make definite and certain on the grounds that the proceeding was penal in nature was overruled. Trial in the form of an evidentiary hearing was had upon the issues joined by respondent's general denial before a panel of three Commissioners as provided for in Section 10 of said Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio. Upon the finding of grounds for indefinite suspension of respondent from the practice of law, the matter proceeded to review under the provisions of Section 14 of the said Rule XXVII by the entire Board of Commissioners on Grievances and Discipline, which filed, on May 13, 1963, its Findings of Facts, Conclusions and Recommendation in the Supreme Court of the State of Ohio. The judgment of the Supreme Court of Ohio, from which this appeal is taken, confirmed the report of the said Board of Commissioners and ordered the respondent, the appellant herein, suspended indefinitely from the practice of law in the State of Ohio. That judgment was made and entered on January 29, 1964. Application for rehearing was denied by order of the Supreme Court of the State of Ohio on February 26, 1964. Notice of appeal was filed in that Court on March 9, 1964, and on the 11th day of March, 1964 the Supreme Court of the State of Ohio granted appellant a stay of execution of the said judgment until the final disposition of the appeal has been effected.

The Manner in which and the Method by which the Federal Questions were presented and the Dispositions made thereof

The proceedings under Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio since the amendment thereof effective January 1, 1957 are decidedly anomalous in that the trial is to a Panel of three Commissioners. There is a review of the findings of facts, conclusions and recommendation of the Panel by the entire Board of Commissioners on Grievances and Discipline, and there is a review on the report of the entire Board on Grievances and Discipline of its findings of facts, conclusions and recommendation and the objections thereto of the respondent in the Supreme Court of the State of Ohio. Treating the Panel and the entire Board as courts of the State of Ohio in this proceeding, the Federal questions presented by this appeal were raised initially by the respondent's motion to make definite and certain and brief in support thereof presented to the Panel of three Commissioners. Said motion to make definite and certain was overruled on the grounds that Section 9 provides only that the Board of Commissioners may pass upon the sufficiency of the complaint and that, if the complaint is not dismissed by the Board *sua sponte*, it must be answered. The first, second and third of the four questions presented were adverted to in the opening statement by Mr. Tyack. (R. 13-19) There was no ruling by the Panel, except that the trial proceeded. The first of the four questions presented was preserved by argument against the existence of moral turpitude in the conduct of the respondent since the law recognized the right of persons not admitted to the practice of law to represent claimants before the administrative agencies created by the Workmen's Compensation Laws of the State of Ohio, appearing at pages 43, 45, 1-A, 7-A,

8-A, 10-A, 11-A, 15-A, and 17-A to 23-A of the respondent's brief before the Board of Commissioners on Grievances and Discipline, in Objections 1, 3, 4, 5, and 7, which commence, respectively, at pages 3, 21, 22 (Objections 4 and 5) and 28 of said Objections of Respondent filed in the Supreme Court of the State of Ohio, and at pages 3 and 24 of the respondent's brief in support of his objections filed in the said Supreme Court. The second of the four questions is presented, in addition to its mention in the said opening statement, at pages 1-A and 3-A of the Brief of the Respondent before the said Board, at Objection 1, page 3, and Objection 3, page 21, of the said Objections, and at page 1 and at page 21 of the Brief of the Respondent in support of the Objections. The third of the four questions presented, the contention that the proceedings exceed constitutional limitations because of their *ex post facto* effect, appears at pages 25, 26, 43, and 5-A of the Brief of Respondent filed with the said Board, and at page 2 and page 4 of the Brief of the Respondent in support of his objections filed in the said Supreme Court of Ohio. The fourth of the questions presented, that it is not shown that there is a "person aggrieved", appears at page 1 and page 45 of the said Brief of the Respondent before the said Board and at page 37 of the Brief in support of the Respondent's objections filed in the Supreme Court of the State of Ohio.

Uniformly, the Federal constitutional questions put forth by the Respondent met with short shrift. He was adjudged guilty of violation of each and every one of the Canons of Professional Ethics he was alleged to have violated; two, not orginally included in the complaint, if we may judge by relator's opening statement, were added in the conclusions and recommendation of the Panel, and another, still, was anticipated in the findings of fact, conclu-

sions and recommendation of the entire Board, which was reported according to Section 15 of said Rule XXVII.

THE QUESTIONS ARE SUBSTANTIAL

There has been an erosion of the principles which govern discipline of attorneys at law. The Bar must ever strive to improve itself, and one of the most important aspects of its efforts is, properly, the discipline of the unworthy. Discipline of attorneys at law cannot, however, be permitted to go outside or beyond the law for the accomplishment of its entirely laudable purposes.

As early as 1885 as Section 563 of the Revised Statutes of Ohio, it was provided that,

> "The supreme court, the circuit court, or the common pleas court may suspend or remove any attorney at law from office for either of the following causes: misconduct in office, conviction of a crime involving moral turpitude, or unprofessional conduct involving moral turpitude . . . ."

The statute now provides, Section 4705.02 of the Revised Code of Ohio,

> "The supreme court, court of appeals, or court of common pleas may suspend or remove an attorney at law from office or may give private or public reprimand to him as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude, or for conviction of a crime involving moral turpitude . . . ."

Section 5 of Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio, effective January 1, 1957, redefined the grounds for discipline of an attorney at law, and in doing so eliminated the statutory requirement that moral turpitude be an element of the misconduct or unprofessional conduct in office upon which discipline of an attorney at law may proceed. Said Rule XXVII is a

statute of the State of Ohio within the intendment of *Hamilton* v. *Board of Regents of the University of California*, 293 U. S. 245, 79 L. Ed. 343, 55 S. Ct. 197 (1934) reh. den. 293 U. S. 633; *Lathrop* v. *Donahue*, 367 U. S. 280, 6 L. Ed. 2d 1191, 81 S. Ct. 1826, reh. den. 368 U. S. 871; *Williams* v. *Bruffy*, 96 U. S. 176, 24 L. Ed. 716.

In *Sacher* v. *Association of the Bar of the City of New York, et al.*, 347 U. S. 388, 74 S. Ct. 569, the Supreme Court of the United States recognized the seriousness to the disciplined attorney-at law of an excessive penalty. Deprivation of one of the right or privilege of engaging in the practice of law is an extremely severe penalty; it is a forfeiture of the privilege; and it is deprivation of one of the right to earn a livelihood in the manner to which he is accustomed and for which he has been trained. Review of the judgment appealed from is urged in order that a determination may be had of whether the said Rule XXVII does not exceed constitutional limitations imposed by the Fourteenth Amendment to the Constitution of the United States as said Rule has been applied in the judgment review of which is sought. *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 69 S. Ct. 1291 (Ohio, 1949); *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676 (Virginia, 1879); *American Federation of Labor, et al.* v. *Swing, et al.* 312 U. S. 321, 85 L. Ed. 855, 61 S. Ct. 568 (Illinois, 1941); *New York Times Co.* v. *Sullivan*, ——U. S.——, 11 L. Ed. 2d 686, 84 S. Ct. 710 (Alabama, 1964). Certainly there is no doubt that in carrying out its highly important function of restricting the right or privilege of the practice of law to those only who possess the high qualifications demanded by the Bar, all charged with the task must act responsibly, according to law, and within the limitations imposed by the Constitution of the United States. In *Schware* v. *Board of Bar Examiners*

of the State of New Mexico, 353 U. S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957), this Court held,

> "(a) A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Clause of the Fourteenth Amendment. P. 238, 239
>
> "(b) A State can require high standards of qualifications, such as good moral character or pr[illegible]ciency in its law, before it admits an applicant to the bar; but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. P. 239. . . .
>
> "(d) Whether the practice of law is a 'right' or a 'privilege' need not here be determined; it is not a matter of the State's grace and a person cannot be barred except for valid reasons. P. 239, n. 5.

Schware had been charged with, but not convicted of, recruiting persons to aid the Loyalists in the Spanish Civil War in violation of the Neutrality Act of 1917. This Court in an opinion by Mr. Justice Black held,

> "But even if it be assumed that the law was violated, it does not seem that such an offense indicated moral turpitude." P. 242.

Elimination of the element of moral turpitude as a necessary element to support severe discipline of an attorney at law is not the only defect which has crept into disciplinary proceedings as applied in the judgment review of which is sought. In addition "written charges", as required by Section 4705.03 of the Revised Code of Ohio, has been reduced to a "complaint alleging misconduct", the requirement provided by the said Rule XXVII. Moreover the complaint was devoid of specifications of time, place, persons. Written charges under the statutory provision could not have been so lacking in definiteness. Want of definiteness and certainty was buttressed by the Panel's ruling on the respondent's motion to make definite and certain that

the said Rule XXVII contained no provision for such a motion. The erosion of principle has extended to the quantum of the evidence required in disciplinary proceedings against an attorney at law. It was held by an appellate court in *In re Chappel*, 12 O. O. 499, 33 N. E. 2d 393 (1941) that the statute regulating the suspension and removal of attorneys at law from their offices was "penal" in nature and should be strictly construed, and it was held also that the evidence to warrant disbarment must be "clear and convincing". While in *Cleveland Bar Association* v. *Fleck*, 172 O. S. 467, 178 N. E. 2d 782 (December 6, 1961), the Supreme Court of Ohio held in the first paragraph of the syllabus,

> "Degree of proof required in disbarment proceedings is a preponderance of the evidence."

The question of the quantum of the evidence is not explicit in the judgment review of which is sought, except insofar as it is one of the incidents of the Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio which is asserted to exceed constitutional limitations on other grounds in the case at bar. But when it is considered that moral turpitude was not so much as claimed by the proponents of the disciplinary proceedings herein, and that each item of the complaint rests upon the most tenuous and technical grounds, it is clear that in the case at bar the Panel, the entire Board, and the Supreme Court of the State of Ohio acted to suspend the appellant indefinitely upon evidence of misconduct which was slight.

The complaint herein mentions no dates but was filed July 28, 1962, was heard and the findings of facts, conclusions and recommendation of the entire Board were filed in the Supreme Court of the State of Ohio on May 13, 1963. It is not to be denied that the persons and agencies, the Panel and the entire Board, on and before that date, May

13, 1963, had anticipated and had applied a rule, the rule of the judgment in *Brown, Weiss and Wohl*, 175 O. S. 149, which was not to be announced by the Supreme Court of Ohio until July 10, 1963, a full two months later. That judgment held in the first paragraph of its syllabus,

> "1. Section 35, Article II of the Ohio Constitution, does not confer upon the Industrial Commission the authority to determine the qualifications of persons engaged in the practice of law before the Industrial Commission.

It is essential to the rule stated above that the representation of claimants before the Industrial Commission have been declared to have been the practice of law. The anticipation of the rule in *Brown, Weiss and Wohl* is not aided by the illogic of the judgment review of which is sought that "services to a claimant in an Industrial Commission case were always legal services when rendered by a lawyer", since appellant's defense was that Sullens in particular, with whom he had worked in the representation of claimants, was authorized, until the decision in *Brown, Weiss and Wohl*, to represent claimants for a fee though Sullens had not been admitted to the practice of law. How then could it be an offense of any kind for Sullens to be paid for work on claims that he had, at the time complained of, untrammeled authority to perform? How can appellant be disciplined for violation of Canon 34, or Canon 35, or both, when, again to take the example of Sullens, engaged an attorney at law, appellant, to carry on the representation of a claimant when a Columbus presence was required, or the services of an attorney at law were required? How can the requirement of moral turpitude be furnished in respect of conduct alleged to have been wrongful a full year and more before the determination was made and announced on July 10, 1963?

Finally, Section 8 of Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio provides in its last sentence, "The complaint may also, but need not, be signed by the person aggrieved." This provision suggests with some force that, in a disciplinary proceeding against an attorney at law, in which the penalty is severe, there is the concept that someone must have been wronged by the misconduct alleged; that the person so aggrieved, for whom the Bar acts in initiating disciplinary proceedings. As a matter of most rudimentary logic, if there is misconduct by an attorney at law, someone is inconvenienced, or discommoded, however slightly. No claim or suggestion is made in the facts hereby presented that there was a person aggrieved. The misconduct alleged exists, therefore, in a sort of vacuum; the misconduct, if proven is not connected to a circumstance of injustice, unfairness, discourtesy, overreaching, or the like.

It is no extravagance to assert that review of a judgment which suspends an attorney at law from the practice of law in Ohio for an indefinite period is desirable and is important, for the entire bar, every attorney at law in the State of Ohio is affected by any freedom to discipline an attorney at law, not if done justly for real transgressions; but if disciplinary action can be taken where there is no claim of moral turpitude, upon a complaint or charges which lack the virtues of definiteness and certainty, without definition of the wrong perpetrated, upon a bare preponderance of the evidence, and for alleged transgressions where no one has been discommoded or inconvenienced, the situation may be most oppressive, requiring clarification.

CONCLUSION

There is no mention of moral turpitude, but merely of violations of certain Canons of the Canons of Professional Ethics, where moral turpitude is required by the statute which governs and is the rule universally. The severity of the discipline is disregarded by ignoring the penal nature of the civil proceeding. Thus a complaint in the vaguest language may be substituted for the written charges required by the statute. In the wake of the foregoing, the quantum of the evidence comes to be reduced from that which is clear and convincing to a bare preponderance of the evidence. A rule of law is applied by the Panel and the entire Board two months before it comes into being and is made to operate retrospectively by a year and more.

Without the "statute of the State", which Rule XXVII of the rule of Practice of the Supreme Court of the State of Ohio is, none of the foregoing, each of which constitutes a denial of appellant's constitutional rights, could have been accomplished. It is respectfully urged that review of the judgment of the Supreme Court of the State of Ohio, review of which is here sought, be undertaken.

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APPENDIX

COMPLAINT AND CERTIFICATE (RULE XXVII OF SUPREME COURT OF OHIO)

Complaint

Now comes the Relator and alleges that Kenneth W. Agee, an Attorney at Law, duly admitted to the practice of law in this State of Ohio is guilty of the following misconduct:

I. That the said Kenneth W. Agee, in his capacity as Attorney, by and through his association and relationship with laymen has directly and indirectly solicited professional employment and authority to process claims and represent claimants in respect to claims which they might have or had pending before the Industrial Commission and/or the Bureau of Workmen's Compensation of the State of Ohio; that said laymen were compensated by the said Kenneth W. Agee as an inducement or payment for solicitation or procurement of legal services. That by said solicitations of professional employment by direct and indirect methods the said Kenneth W. Agee violated *Sections 4123.88 and 4705.08 of the Revised Code of Ohio* and violated the Canons of Professional Ethics as adopted by this Court and violated his Oath of Office as an Attorney at Law.

II. That the said Kenneth W. Agee, in his capacity as Attorney, maintained an association and relationship with laymen and said laymen obtained for the said Kenneth W. Agee professional employment and authority for him to take charge of claims or represent claimants in respect to a claim or claims which they might have or had pending before the Industrial Commission and/or the Bureau of Workmen's Compensation of the State of Ohio; that said

claims were handled on a contingent fee arrangement. That the fee or fees obtained as a result of representing said claimants were divided or apportioned as between the said Kenneth W. Agee and the said laymen. That by the division or apportionment of said fees with laymen, said division or apportionment having been made as an inducement or payment for solicitation or procurement of legal services from persons with whom the said Kenneth W. Agee had no prior personal relations, the said Kenneth W. Agee violated *Sections 4123.88 and 4705.08 of the Revised Code of Ohio* and violated the Canons of Professional Ethics as adopted by this Court and violated his Oath of Office as an Attorney at Law..

III. That the said Kenneth W. Agee, in his capacity as Attorney, maintained an association and relationship with laymen, and in said association and relationship with said laymen the said Kenneth W. Agee delegated legal responsibility to said laymen for the representation of claimants in respect to a claim or claims which they might have or had pending before the Industrial Commission and/or the Bureau of Workmen's Compensation of Ohio thereby aiding or making possible the unauthorized practice of law in violation of the Canons of Professional Ethics as adopted by this Court and in violation of his Oath of Office as an Attorney at Law.

IV. That the said Kenneth W. Agee, in his capacity as Attorney, maintained an association and relationship with laymen and in said association and relationship with said laymen permitted said laymen to intervene, control, and exploit the professional services and professional name of the said Kenneth W. Agee in violation of the Canons of Professional Ethics as adopted by this Court and in violation of his Oath of Office as an Attorney at Law.

V. That the said Kenneth W. Agee, in his capacity as Attorney, caused the printing and distribution of advertisements in the form of hand-bills or circulars which contained information relating to award schedules of permanent partial compensation of the Industrial Commission and/or the Bureau of Workmen's Compensation of the State of Ohio. Said hand-bills or circulars containing the name, office address and phone number of the said Kenneth W. Agee as "Attorney at Law". That the distribution of said hand-bills or circulars constituted the solicitation of professional employment by the said Kenneth W. Agee in violation of *Sections 4123.88 and 4705.08 of the Revised Code of Ohio* and in violation of the Canons of Professional Ethics as adopted by this Court and in violation of his Oath of Office as an Attorney at Law.

S. Noel Melvin,
J. Raymond Probaska,
James C. Justice,
Counsel for Relator.

Certificate

The undersigned Chairman of the Grievance Committee of the Columbus Bar Association hereby certifies that S. Noel Melvin, J. Raymond Probaska and James C. Justice, are duly authorized to represent Relator in the premises and have accepted the responsibility of prosecuting the complaint to its conclusion. After investigation, Relator believes reasonable cause exists to warrant a hearing on such complaint.

C. William Malone,
Chairman, Grievance Committee,
The Columbus Bar Association.

Rule XXVII

Section (8)

THE COMPLAINT, BY WHOM SIGNED. A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct of one, who shall be designated therein as the Respondent. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint. The complaint may also, but need not, be signed by the person aggrieved.

FINDINGS OF FACT AND RECOMMENDATION OF BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

This matter came on for review by the Board of Commissioners on Grievances and Discipline on the complete record of the proceedings before the Hearing Panel and on the Panel's report. On consideration whereof the Board makes the following findings and recommendation:

Findings of Fact

The Respondent was admitted to the practice of law in 1941 and has a law office located at 50 West Broad Street, Columbus, Ohio. He is married and 52 years of age.

Prior to his admittance to the Bar, Respondent was employed in the claims department of the Industrial Commission for a little over two years. Thereafter in 1931 he started in business with one Dale Stump (who had also been with the claims department in the Industrial Commission) as compensation consultants. Later on he went into business for himself before being admitted to the Bar. Following the holding of *Goodman* v. *Beall*, 130 Ohio St. 427, he did not handle any rehearings, but would handle all phases of claim work up to the point of rehearing and in connection therewith hired lay personnel.

After being admitted to the Bar, he continued to hire lay personnel who would handle various hearings in the Bureau of Workmen's Compensation and Industrial Commission and branch offices. Currently and for some time he has had on his payroll various full time lay employees. Edwin Sahr in his office reviews files of the Industrial Commission, checks status of claims, and occasionally confers with clients. John F. Conley, a law student, checks status of claims and investigates. William Edwards has been in charge of making collections, pays bills, talks to clients, and fills out forms. Mr. Edwards, like other lay employees of Respondent, had been furnished business cards by Respondent, with his reading:

"Kenneth Agee, Attorney at Law
Presented by William Edwards"

Marvin Lewis checks the status of claims, investigates, and talks to clients when directed to do so, usually at the offices in Logan and Zanesville. Robert E. Shumaker investigates cases pending before the Commission on lump sum settlement offers, and gathers together proof in an effort to convince the commission that a given claim should be settled or allowed without the necessity of any court trial. A Mr. Underwood runs errands and spot checks files at the

Commission. Wilford C. Bandy, who has been piloting a two-motor plane owned by Respondent, now spends most of his time at the Industrial Commission, checking and expediting files there. He also talks to clients. A Mr. Nelson looks over Respondent's interests (particularly land) in California, doing some investigations, collections, and arranging for medical examinations there. Robert Griffith of Ironton, Ohio is on a salary of $100.00 per week for Respondent, operating out of an office in his house there. He assists in investigations in the Ironton area. Persons coming in to see Mr. Griffith are referred to Respondent and Mr. Griffith holds himself out as a representative of Respondent in the Ironton area, which presently is one of the main areas of claims handled by Respondent. All of these lay employees, except Messrs. Underwood, Nelson and Griffith, have handled hearings for Respondent.

Back in the 1930's he met Walter Sullens, who in those days with his wife operated the Sullen Vapor Baths in Portsmouth, Ohio. He was introduced to him by a Si Parks, a partner in the compensation consultant business with Respondent for awhile. In the early 1940's Mr. Sullens had come to do some investigation work on claims for Mr. Parks and after Mr. Parks died around 1948, Respondent started to get some referrals from Mr. Sullens. Mr. Sullens also formerly worked in a steel mill, drove a bread wagon, worked in a shoe factory and in the early 1940's was on the Portsmouth police force. He has a common school education up through the 8th grade and has never taken any special courses. Since 1953 he has been working full time as a registered practitioner before the Industrial Commission. At the time of the hearing he was listed as the only Workmen's Compensation consultant in the yellow pages of the Portsmouth telephone directory and now has between 600

to 800 files, with his business increasing all of the time. All cases now referred by him are referred to Respondent.

Since December 1956, Mr. Sullens has had an office on the mezzanine floor, two floors below the branch office of the Workmen's Compensation Bureau offices in Portsmouth. He has three lay people working for him: Betty Mercer, a stenographer, Harold Gibson who interviews clients and checks files; and a Raymond Tomlinson who lives at Jackson, Ohio and does investigation work out of his home there as a full time employee.

Respondent and Mr. Sullens have a private telephone line and they share the telephone expense of the Portsmouth office. They split the fees on each case referred on a basis negotiated between them as to each file. During the calendar year of 1961 Mr. Sullens admits receiving $48,000.00 from Respondent as his share of the fees involved in cases referred.

On all stationery going out of the office of Respondent there is reflected thereon himself as "Attorney-at-Law", with a Columbus office and a Portsmouth office, and with his telephone number for each office.

When claimants come in to Mr. Sullens, he generally has them sign an authorization for himself and Respondent to examine the file, and a contract form ("Resp. Ex. B") furnished by Respondent as follows:

Date.....

"Mr. Kenneth Agee, Attorney at Law
50 West Broad Street
Columbus 15, Ohio

Dear Sir:

I hereby authorize you to represent me in conjunction with my claim

In consideration of your services, I agree to pay you not more than ( ) of all moneys collected in my behalf. If you recover nothing, I owe you nothing.

.....
"

Mr. Sullens says he usually takes cases on a $33\frac{1}{3}$ basis and the contract is intended to carry clear through legal proceedings in Common Pleas Court if necessary. He further testified he also writes his own name in on the contract form. Mr. Sullens handles all hearings in the Portsmouth area, but denies ever having solicited any cases and says that cases are also referred to him by attorneys.

Forty per cent of Respondent's business is referral, with twenty per cent or approximately one half of the referrals from Mr. Sullens. His arrangement with Mr. Sullens now ranges up to fifty per cent of the fee involved and Respondent admits to adjusting his fee splits to be competitive in the market place. When a particular file reaches the point where it goes into Common Pleas Court, Respondent usually pays the lawyer who prepares the pleading $50.00 and the trial lawyer one-third or fifty per cent of the fee less $50.00 for the fee of the lawyer who prepared the pleadings. The balance left is split with Mr. Sullens upon their negotiated basis, all within the terms of the original contract signed by the client. When expenses are incurred but no recovery is had, Respondent frequently absorbs those expenses. He has never considered a medical examination bill an item of expense to be paid by the client because he incurred it and the contracts he has had claimant sign do not go into the matter of expense.

Raymond Starns, a witness who lives at Portsmouth, Ohio testified that Mr. Sullens mentioned to him a couple or three times that "he (meaning Mr. Sullens) would take care of me" if he referred any claimants to him. This is denied by Mr. Sullens and Mr. Starns says that while he has referred claimants to Mr. Sullens, he has to date not received anything from him and does not know whether the claimants to whom he recommended Mr. Sullens actually went to him.

Charles McClelland testified how he went to Walter Sullens after having been injured and then was referred to Respondent by Mr. Sullens. Later on when he was injured in another accident and was in the hospital, Mr. Edwards from Respondent's office came to the hospital and asked him what happened and then said "I guess you want us to represent you in this, too". Lay members on the payroll of Respondent handled the hearings for Mr. McClelland as has been the practice in Respondent's office with many claimants over the years.

John P. Conley, lay investigator for Respondent and attending law school at Franklin University in Columbus, testified that Respondent represented Albert Harner and his claim for compensation. Upon Respondent receiving a letter terminating his services, at Respondent's direction, Mr. Conley went to the Harner home at Springfield, Ohio. Mr. Harner was not there at the time, but he did talk to Mr. Harner's wife. Subsequently he talked on the telephone to Mr. Harner. When he found that Mr. Harner was concerned about how the fee problem would be resolved with two lawyers, Mr. Conley explained to him that Respondent and the other attorney would resolve the fee problem and that would not be any concern of the client. Respondent felt that he had a right to go to his client to ascertain the circumstances of his dismissal.

For about 20 years, Respondent has been having printed up card charts of permanent partial awards, of which "Relator's Ex. 32" is an example. He has had at least six different printings of them and distributes them mainly to personnel of the Industrial Commission, other attorneys, and anyone who is interested and requests them, including those who refer cases to him. He insists they were not in general circulation and he did not mean to advertise, and after complaints were made from the Bar Associa-

tion, he deleted his name as "Attorney-at-Law", office address, and office telephone number from the cards and they were thereafter published without them, as illustrated by "Respondent's Ex. E". These cards were also distributed through the Bar Association, who requested them for their members who desired them.

From the testimony of Lawrence A Gibbs, employed by the Bureau of Workmen's Compensation, Respondent, and Maynard Dickerson, Chairman of the Industrial Commission, there is reflected that laymen practice before the Commission, including lay members of actuarial firms and corporate employees. Formerly laymen were issued cards certifying their right to practice before the Commission, but there no longer is any requirement that they have cards or that they be certified. Mr. Gibbs, himself an attorney admitted to the Bar in 1954 and having the position of attorney examiner, further testified without contradiction that the Deputy Administrator of the Bureau of Workmen's Compensation may or may not be an attorney and many of the personnel of the Bureau of Workmen's Compensation are lay people. He pointed out that much of the evidence involved has to do with medical questions with most of the hearings being quite informal and not governed by any rules of evidence. At these hearings affidavits and hearsay evidence are accepted. Many of the hearings involved are very short and routine, and based largely upon medical proof submitted. All procedure is pretty well set out on notices advising the result of a decision reached on any hearing had under the present law. After all other hearings before the Bureau of Workmen's Compensation or Industrial Commission are exhausted, the cases are tried *de novo* in the Common Pleas Court.

Respondent conducted himself in a cooperative spirit throughout the trial and stated that in the past whenever

he found that he was doing anything which was regarded as unethical, he would change it and since the complaint of the Bar Association in March of this year he no longer has laymen on his payroll who handle hearings. However, he still has on his payroll more lay personnel than lawyers and his business has continued to grow. He said when he started in the early days there were very few lawyers interested and the practice was largely taken over by laymen. He asserts that it does not make him happy to be competing with laymen in what he refers to as the "business" of handling compensation claims. However, he acknowledges at least that when a client is advised on violations, depositions are taken, or a given matter is taken to court such is the practice of law.

CONCLUSION

From all of the foregoing it is the determination of this Board that Respondent has been guilty of misconduct as defined in Section 5 of Rule XXVII of the Supreme Court of Ohio in that he has violated Canons 26, 27, 28, 29, 34 and 35 of the Canons of Professional Ethics.

It is contended by Respondent that many phases of the practice before the Industrial Commission and the Bureau of Workmen's Compensation do not involve the practice of law, although Respondent concedes that some do. The Board makes no finding as to whether any of the matters now being handled by lay practitioners before said bodies involve their unauthorized practice of law, but to the extent that any part of the practice of Walter Sullens does constitute the unauthorized practice of law, this Board is of the opinion that Respondent would also be clearly guilty of violation of Canon 47 of the Canons of Professional Ethics. In this connection, we wish to point out that at all times involving the charges in this cause Respondent

held himself out as an attorney-at-law and that even if that were not true or any part of his activities should not be regarded as the practice of law, it is the opinion of the Board that the responsibility for his living up to the Canons of Professional Ethics would continue at least so long as he holds himself out as a member of the Bar.

RECOMMENDATION

It is the recommendation of the Board of Commissioners that the Respondent, Kenneth Agee, be suspended for an indefinite period from the practice of law subject only to reinstatement as provided in Section 6 (b) of Rule XXVII on Disciplinary Procedure of the Supreme Court of Ohio.

Respectfully submitted,

C. R. Beirne,
Chairman, Board of Commissioners on Grievances and Discipline

John W. McMillan,
Secretary, Board of Commissioners on Grievances and Discipline

THE JUDGMENT FROM WHICH APPEAL IS TAKEN

Statement of the Case.

COLUMBUS BAR ASSOCIATION *v.* AGEE.

Attorneys at law—Misconduct—Practice before Industrial Commission — Soliciting professional employment — Employment of lay personnel—Division of fees on referred cases—Indefinite suspension from practice—Acts warranting.

(D. D. No. 48—Decided January 29, 1964.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

On May 13, 1963, the Board of Commissioners on Grievances and Discipline filed in this court its findings of facts, conclusion and recommendation, pursuant to a complaint of the Columbus Bar Association and a hearing duly had thereon.

The board found:

Respondent was admitted to the practice of law in 1941. Prior to his admittance to the Bar, he had been a compensation consultant for approximately ten years.

After being admitted to the Bar, he continued to hire lay personnel who would handle various hearings before the Bureau of Workmen's Compensation and the Industrial Commission and in branch offices.

One Sullens lived in Portsmouth, Ohio. He had a common-school education up through the eighth grade and has never taken any special course. Since 1953, he has been working as a registered practitioner before the Industrial Commission. At the time of the hearing, he was the only one listed as a workman's compensation consultant in the yellow pages of the Portsmouth telephone directory and

now has between 600 and 800 files, with his business increasing all the time. All cases now referred by him are referred to respondent.

Respondent and Sullens have a private telephone line, and they share the telephone expense of the Portsmouth office. They split the fees on each case referred, on a basis negotiated between them as to each file. Sullens admits receiving, during the calendar year of 1961, $48,000 from respondent as the former's share of the fees involved in cases referred.

On all stationery going out of the office of respondent, he is designated as "attorney-at-law," with a Columbus office and a Portsmouth office and with his telephone number for each office.

When claimants come to Sullens, he generally has each of them sign an authorization for himself and respondent to examine the file, and a contract form furnished by respondent in the name of "Mr. Kenneth Agee, Attorney-at-Law."

Forty per cent of respondent's business is referral, with approximately one-half of the referrals by Sullens. Respondent's arrangement with Sullens now ranges up to 50 per cent of the fee involved, and respondent admits to adjusting his fee splits to be competitive in the market place.

The board concluded that respondent had violated Canons 26, 27, 28, 29, 34 and 35 of the Canons of Professional Ethics adopted by the Supreme Court of Ohio and recommended that he be suspended for an indefinite period from the practice of law.

Mr. James C. Justice, *Mr. S. Noel Melvin* and *Mr. J. Raymond Prohaska*, for relator.

Mr. George E. Tyack and *Mr. Harry B. Reese*, for respondent.

Per Curiam. The objections of the respondent to the findings and recommendation of the Board of Commissioners on Grievances and Discipline raise three issues for our determination.

The respondent alleges that the proceedings before the panel were unconstitutional and deprived the respondent of due process. This issue was raised and rejected in *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St., 17. The subject was considered in detail in that case and merits no further consideration here.

The respondent claims also that the findings of the board are not supported by the evidence. The board determined that respondent had been guilty of misconduct within the meaning of Rule 27 of the Supreme Court of Ohio in that he violated Canons 26, 27, 28, 29, 34 and 35 of the Canons of Professional Ethics adopted by this court on November 13, 1952. An examination of the record indicates substantial evidence to support these findings.

Canon 34 provides that "no division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."

The following testimony of respondent before the board establishes that there was a division of fees in all cases referred by Sullens:

"Q. And you say it used to be not more than a third. What is the rough percentage you would use these days? A. Well, I would try to see that he never got any more than 45 or so per cent of it, if I could avoid it. It is up to his demand. So far, like I say, we have gotten alone fine. So, I think he has gotten more than a half, even.

"• • • •

"[Q.] • • •: The percentage arrangement you now have with him, sort of resulting from pressure in the market place, what you have to bid for it to get his business?

"The witness: That is definitely right.

"* * *

"[Q.] * * *: Is this a fair statement: In the course of time you went from sort of a flat fee into percentages which over a period of time, because of his upping his demands, results in a percentage today of 50 per cent?

"The witness: It is almost that high * * *."

In his brief in support of his objections, respondent claims that this is not "fee-splitting" but merely a division of the compensation based upon the amount of work done. This contention might have weight if the compensation was divided between lawyers, but Canon 34 forbids all division of fees between an attorney and a layman.

Goodman v. Beall et al., Indus. Comm. (1936), 130 Ohio St., 427, set down the law in this field prior to *In re Brown, Weiss and Wohl* (1963), 175 Ohio St., 149. In the *Goodman case*, a writ of prohibition against the members of the Industrial Commission was allowed in part, restraining the members of the commission from permitting laymen to appear before them in a representative capacity for a claimant after he had received notice that his claim had been disallowed. The court refused to require the commission to prohibit the appearance of laymen prior to that point in the proceedings.

Respondent contends that, since laymen were permitted to practice before the commission, a lawyer representing a claimant on an Industrial Commission case could ethically share his fee with a layman until the decision in the *Brown, Weiss and Wohl case*. This is a *non sequitur*.

Although it may be true that the prohibition in Canon 34 is limited to fees received for legal services, services to a claimant in an Industrial Commission case were always legal services when rendered by a lawyer. There are many areas in which personal services do not constitute the

practice of law when done by a layman but which are the practice of law when performed by an attorney, *e. g.*, work in the fields of income tax and trademarks. The respondent seemed well aware that his work constituted legal services since he contracted with claimants in his name as an attorney. Authorizations from claimants were obtained in the name of "Mr. Kenneth Agee, Attorney at Law." He, therefore, could not ethically divide his fees for such services with a layman, even though the layman could have performed the same services.

The relationship between respondent and laymen, such as Sullens, in Portsmouth, and one Griffith, in Ironton, constituted a violation of Canons 27 (soliciting professional employment through touters), 28 (stirring up litigation through agents), and 35 (intermediaries). It is apparent that these men were valuable not because of the work that they performed but because they were well known in their communities. Their purpose was to obtain industrial claimants at Ironton and Portsmouth as clients for respondent. Although such conduct is more subtle than "ambulance-chasing," the purpose and end result are the same.

The aim of Canon 35 is to preserve the personal relationship that should exist between a lawyer and his client. The testimony of both respondent and Sullens disclosed that claimants coming to see Sullens became clients of respondent by signing a contract upon which his name appeared, without ever meeting him. To permit such conduct is a clear violation of the canon. One of respondent's clients testified as follows:

"Q. Have you ever met Mr. Agee? A. No, I don't think I ever met him at his office.

"Q. Would you know Mr. Agee if you saw him? A. No I wouldn't.

The board found also that there was a violation of Canons 26 and 29. Canon 29 is entitled: "Upholding the Honor of the Profession." It would seem that the violation of any canon would also be a violation of this one. Canon 26 requires that the same principles of ethics should bind the lawyer when he appears before a body other than a court.

Respondent's final objection is that the recommendation of the board is too harsh. Indefinite suspension is a harsh penalty. However, this is not a situation where there has been one transgression in a long and otherwise unblemished career. Respondent has used laymen to funnel clients to his office for most of his professional life. The recommendation of the board is in line with the discipline approved by this court in *Dayton Bar Assn. v. Herzog* (1962), 173 Ohio St., 313, and *Cleveland Bar Assn. v. Fleck* (1961), 172 Ohio St., 467, both of which involved practitioners in the field of workmen's compensation.

Based on the record before it, this court concludes that in justice to the public and to the profession it is the court's unpleasant but clear duty to overrule the objections of the respondent and to approve the recommendation of the board that the respondent be suspended indefinitely from the practice of law in this state.

Report confirmed and judgment accordingly.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, GRIFFITH and GIBSON, JJ., concur.

HERBERT, J., concurs except as to the penalty, which should be a public reprimand.

NOTICE

KENNETH W. AGEE AND STANLEY R. JURUS, JR., INDEFINITELY SUSPENDED FROM PRACTICE

Kenneth W. Agee and Stanley R. Jurus, Jr., both of Columbus, were indefinitely suspended from the practice of law by the Supreme Court of Ohio on January 29, 1964, for violations of the Canons of Professional Ethics.

Recommendations of the suspensions were made by the Court's Board of Commissioners on Grievances and Discipline following hearings on complaints filed by the Columbus Bar Association.

In the Jurus matter the Court found that respondent had paid laymen for soliciting Industrial Commission claimants on his behalf and that he had destroyed his files in several instances because affidavits had been filed with the Industrial Commission charging him with solicitation.

(This notice given in accordance with Section 19 of Rule 27 of the Supreme Court of Ohio.)

RULES OF PRACTICE

Rule XIV, Section 15.

SECTION 15. The applicant upon receiving the oath of office, shall sign a roll showing the date of his admission and the place of his residence. The oath administered shall be as follows:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of Ohio;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge or approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice, So Help Me God.

(Clerk's Note: This form of oath was adopted January 25, 1910. It is the form recommended by the American Bar Association.)

Amended Rule XXVII 164 O. S.

RULE XXVII.

Disciplinary Procedure

Pursuant to the powers of this Court over the Bar of this State and the members thereof, Rule XXVII is hereby amended, as follows, effective on January 1, 1957, and to remain in force until altered or abrogated.

(1) Creation of Board of Commissioners on Grievances and Discipline. There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners is empowered and charged to receive, entertain, inquire into, take proofs, making findings and submit recommendations to this Court, as hereinafter provided,

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by any attorney or counselor at law or judge, or

(b) concerning practices of any attorney and counselor at law or judge, which tend to defeat the administration of justice or to bring the courts or the legal profession into disrepute, or

(c) relating to petitions for reinstatement as an attorney and counselor at law in this state.

(2) Investigations by Local or State Bar Committees. Said Board of Commissioners on its own motion may cause to be instituted as to any such matters whatever investigation or action it deems proper by referring the matters to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association.

(4) Board to Have Exclusive Jurisdiction; Authority of Local Committees. From and after the effective date of this rule, all proceedings for the investigation of complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges, all proceedings for the discipline of such attorneys and counselors at law and judges, and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule; provided, however, that nothing herein contained shall be construed to prevent any committee of any regularly organized local bar association or of the Ohio State Bar Association from investigating and reporting on any complaint filed with it, referred to it, considered by it, or coming to its attention.

(5) Definition of Misconduct. Misconduct, as the term is used herein, shall mean any violation of any provision of the oath of office taken upon admission to practice of

law in this state, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude.

(6) Manner of Discipline. Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

(c) a public reprimand, or

(d) a private reprimand.

(7) Effect of Discipline. A person disbarred shall never thereafter be readmitted to the practice of law in this state. A person who shall have voluntarily surrendered his license to practice and thereafter has been reinstated in the manner hereinafter provided and a person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

(8) The Complaint, by Whom Signed. A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct of one, who shall be designated therein as the Respondent. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing

signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint. The complaint may also, but need not, be signed by the person aggrieved.

(9) Duty of Board upon Filing of Complaint; Notice to Respondent; Time for Answer. All such complaints shall be filed in quadruplicate in the office of the Secretary of the Board of Commissioners. If said Board of Commissioners finds that the complaint, upon its face, does not charge misconduct as herein defined, such complaint shall be dismissed. Otherwise said Secretary forthwith shall cause a copy of such complaint to be sent by registered mail to the Respondent named therein with a notice requiring him to file within twenty (20) days after the mailing of such notice his answer in quadruplicate, and serve copies thereof upon counsel of record named in the complaint.

(10) Hearing by Panel of Three Commissioners. After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint

originated. A majority of such panel shall constitute a quorum for all purposes.

(11) Duty of Panel if Charge Dismissed. If the panel finds that the charges in any complaint do not merit the taking of disciplinary action, the complaint shall be dismissed, and such dismissal shall be reported to the Secretary of the Board of Commissioners, who shall notify the Respondent and all counsel of record of such action and shall notify the local bar association or associations of the County or Counties in which the Respondent resides and maintains his office, and of the County or Counties from which the complaint arose, of such action.

(12) Private Reprimand; Duty of Panel. If the panel finds and determines that the Respondent is guilty of misconduct and that private reprimand should be administered, such panel shall administer such reprimand and such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by such panel.

(13) Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel. If the panel finds and determines that the Respondent is guilty of misconduct and the public reprimand, indefinite suspension, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) Review by Entire Board of Commissioners; Board to Administer Private Reprimand. Upon review, said Board of Commissioners may refer the matter back to the

panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15 Public Reprimand; Suspension or Permanent Disbarment; Duty of Board after Review. If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(16) Show Cause Order Issued by the Court to Respondent. Upon the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause before this Court at a time to be specified not less than forty (40) days after the issuance

of such order, why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice thereof shall be served by the Clerk of this Court upon the Respondent and all counsel of record, personally or by registered mail.

(17) Time for Filing Objections by Respondent. At least twenty (20) days before the date for showing cause stated in the order of this Court, the Respondent shall file, in the number and form required by rules of this Court for original actions, objections, setting forth the grounds thereof, to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report upon which said order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof upon the Secretary of the Board of Commissioners and upon all counsel of record for the Relator in the hearing before the Board of Commissioners.

(18) Time for Filing Briefs by Relator. Counsel for the Relator before the Board of Commissioners shall file or cause to be filed in the number and form required by the rules of this Court for original actions, such briefs as are deemed necessary in answer to any brief filed by Respondent, together with proof of service of copies thereof upon Respondent or counsel of record for Respondent. The same shall be filed within fifteen (15) days after the filing of Respondent's brief. Extension of time for filing objections and briefs shall be governed by rules applicable to original actions.

(19) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk upon Entering Order. Upon failure of Respondent to file objections within the time limited above, or after consideration of such objections and such briefs as may be filed for and against the same, and after hearing, if requested by this Court, this Court shall

enter such order upon the matter as it may find proper, which may include such provision for reimbursement of the actual and necessary expenses incurred by the Board of Commissioners in connection with said proceedings as the Court shall deem just. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent, at his last known address, to the local bar association or associations in the County or Counties in which the Respondent resides and maintains his office and the County or Counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such County or Counties, and to the Presiding Judge of the United States District Court having jurisdiction in such County or Counties.

(20) PROCEEDINGS PRIVATE UNTIL FILED IN SUPREME COURT. Unless and until filed in the Supreme Court of Ohio, all proceedings and documents relating to complaints and hearings thereon and proceedings in connection therewith shall be private, unless the Respondent shall request in writing that they be public.

Former Rule XXVII

RULE XXVII
DISBARMENT AND REINSTATEMENT

SECTION 1. When an attorney at law has been disbarred or suspended from practice by the judgment of a court of this state other than the Supreme Court, the Clerk of the court rendering such judgment shall certify forthwith a copy of the journal entry thereof to the Clerk of the Supreme Court who shall note the removal on the Journal and the Roll of Attorneys.

SECTION 2. When, after due notice and hearing, a disbarred or indefinitely suspended attorney at law has been ordered reinstated by a court of this state other than the

Supreme Court, the court ordering the reinstatement shall set forth in its journal entry its finding of facts and conclusions of law upon which its order is based. The Clerk of that court shall certify forthwith to the Clerk of the Supreme Court a copy of such journal entry; and if so ordered by the Supreme Court, the clerk thereof shall note on the Journal and on the Roll of Attorneys that the privilege of engaging in the practice of law in this state has been restored to such disbarred or indefinitely suspended attorney. (Adopted November 1, 1945. Effective January 1, 1946.)

RULE XXVIII

RULES OF PROFESSIONAL CONDUCT

SECTION 1. These rules of professional conduct shall be binding upon all members admitted to practice law in the State of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment, as may be determined by any court of competent jurisdiction.

The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association are adopted; and nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof.

SECTION 2. An attorney at law shall not advertise or otherwise solicit professional employment. This rule shall not apply to the publication or use of ordinary professional cards or conventional listings in legal directories and newspapers.

SECTION 3. An attorney at law shall not employ another to solicit or to obtain or remunerate another for soliciting or obtaining professional employment for him.

SECTION 4. An attorney at law shall not acquire an interest adverse to a client in a subject-matter concerning which the attorney has been employed.

SECTION 5. An attorney at law shall not, directly or indirectly, without the consent of his client, purchase property at a Probate, foreclosure or judicial sale in an action or proceeding in which he appears as attorney for a party.

SECTION 6. An attorney at law shall not represent conflicting interests except with the consent of all parties concerned.

SECTION 7. An attorney at law shall not accept professional employment without first disclosing to his prospective client his relation, if any, with the adverse party, and his interest, if any, in the subject-matter of the employment.

SECTION 8. An attorney at law shall not accept employment adverse to a client or former client relating to a matter in reference to which he has obtained confidential information by reason of and in the course of his employment by such client or former client.

CANONS OF PROFESSIONAL ETHICS

CANON 26. PROFESSIONAL ADVOCACY OTHER THAN BEFORE COURTS.

A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

CANON 27. ADVERTISING, DIRECT OR INDIRECT.

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these canons of brief biographical and informative data is permissible. Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practiced; date and place of birth and admission to the Bar; schools attended; with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions; memberships and offices in Bar Associations and committees thereof, in legal and scientific societies and legal fraternities; the fact of listings in other reputable law lists; the names and addresses of references; and, with their written consent, the names of clients regularly represented. A certificate of compliance with the Rules and Standards issued by the Standing Committee on Law Lists may be treated as evidence that such list is reputable.

It is not improper for a lawyer who is admitted to practice as a proctor in admiralty to use that designation on his letterhead or shingle or for a lawyer who has complied with the statutory requirements of admission to practice before the patent office to so use the designation "patent attorney" or "patent lawyer" or "trade-mark attorney" or "trade-mark lawyer" or any combination of those terms.

CANON 28. STIRRING UP LITIGATION, DIRECTLY OR THROUGH AGENTS.

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, Court or prison officials, physicians, hospital *attaches* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

CANON 29. UPHOLDING THE HONOR OF THE PROFESSION.

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

CANON 34. DIVISION OF FEES.

No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.

CANON 35. INTERMEDIARIES.

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

Statement of the Case.

GOODMAN ET AL. *v.* BEALL ET AL., INDUSTRIAL COMMISSION OF OHIO.

Industrial Commission—Workmen's compensation—Practice of law—Appearance or practice in representative capacity after award denied claimant—Section 1465-90, General Code—Appearance or practice on rehearings limited to attorneys at law—Writ of prohibition.

One appearing or practicing before the Industrial Commission of Ohio in a representative capacity subsequent to the time a claimant first receives notice of the disallowance of his claim under Section 1465-90, General Code, is engaged in the practice of law, and prohibition will lie against such commission to prevent the appearance or practice before it on rehearing proceedings of any person other than an attorney at law, duly admitted to practice.

(No. 24947—Decided February 26, 1936.)

IN PROHIBITION.

Plaintiffs are sixteen members of the bar of Ohio, members of a committee on the unauthorized practice of law of the Ohio State Bar Association.

On behalf of themselves, all other members of the Ohio bar, the courts and the public, they seek a writ of prohibition in this court against defendants, John W. Beall, L. E. Nysewander and T. A. Gregory, individually and as members of the Industrial Commission of Ohio, to restrain such defendants from permitting the appearance before them, as such commission, of any person, layman or corporation in a representative capacity wherein such person, layman

or corporation undertakes to practice law, unless such person or layman is first properly and duly admitted to the practice of the law by the Supreme Court of Ohio."

As stated in their brief, the general position of plaintiffs is that practice before the Industrial Commission in "The preparation of the record, the filing of legal documents, applications, motions, appearance at hearings in a representative capacity, presenting evidence and making arguments on law constitute the practice of law."

Defendants have filed an answer and a supplemental answer, informative in character, wherein they neither affirm nor deny the allegations of the petition, but describe generally the functions and activities of the Industrial Commission, and the procedure there followed in the presentation, hearing and disposition of claims.

Defendants do not challenge the propriety of the remedy employed.

The case is now before this court upon motion by the plaintiffs for judgment on the pleadings.

Mr. Sol Goodman, Mr. Lawrence H. Webber, Mr. Norwood E. Blake, Mr. John F. Maher, Mr. H. K. Forsyth, Mr. J. E. Silbaugh, Mr. Arthur Van Epp, Mr. Chas. R. Raedel, Mr. Cedric W. Clark, Mr. E. E. Corn, Mr. Wallace F. Judd, Mr. Walter P. Reese, Mr. Marcellus De Vaughn, Mr. Luther Day, Mr. William J. Meyer and Mr. Milo J. Warner, for plaintiffs.

Mr. John W. Bricker, attorney general, and *Mr. R. R. Zurmehly,* for defendants.

ZIMMERMAN, J. Section 35, Article II, of the Constitution of Ohio reads in part:

"For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to

be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom * * *. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto * * *. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees * * *."

While the same is by no means dispositive of this case, the joint committee sponsoring the adoption of the above constitutional amendment, comprised of representatives of both employers and employees, used the following argument, among others, in urging its merits upon the people of Ohio:

"It assures every worker compensation for injuries or death arising out of and in course of employment, backed by state law and state administration without necessity for recourse to law suits or employment of attorneys or payment of court costs."

Outlining in detail the various provisions of the Workmen's Compensation Act would seem superfluous. One of the main objects sought to be accomplished by its enactment was to provide a speedy, simple and inexpensive method to compensate workmen (or their dependents in case of death) for certain disabilities sustained in the course of and by reason of their employment.

In keeping with an enlightened age the act was designed to create a new system, fair to both employee and employer,

and to do away with the vexatious and protracted litigation, which had proved so costly, exhaustive and unsatisfactory, oftimes resulting in great injustice. Material concessions were made by both employee and employer for the ultimate good of both.

This court has definitely held that the Industrial Commission is essentially an administrative board. *State, ex rel Yaple v. Creamer, Treas.*, 85 Ohio St., 349, 401, 97 N. E., 602, 39 L. R. A. (N. S.), 694; *Fassig v. State, ex rel. Turner, Atty. Genl.*, 95 Ohio St., 232, 116 N. E., 104. There is no requirement that its personnel be members of the legal profession. It is given wide latitude in rule-making powers, and in regulating the practice before it. Sections 871-10, 871-22 (7), 1465-44, 1465-11, General Code.

As an emphasis upon the informality of the proceedings before the Industrial Commission, Section 1465-91, General Code, recites:

"Such compensation shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of his [this] act * * *."

In the vast majority of instances no special skill is required in the preparation and presentation of claims. Ordinarily they consist of statements and affidavits submitted by the employer, the employee, or the latter's dependents, and by others having knowledge of the facts, accompanied by the reports of attending physicians or surgeons, on forms prepared and furnished by the commission. Frequently the commission has its own representative conduct an independent investigation of the particular claim for the purpose of ascertaining the true situation, and some-

times there are informal oral hearings before a referee. Validity of the claim having been established, compensation is paid on the basis prescribed by the statutes, and the incident is closed.

Since the inception of the Workmen's Compensation Act it has been common practice for laymen to assist an injured or diseased workman or his dependents in the submission of a claim. Often this is done as an accommodation by representatives of an organization to which a claimant may belong, and such usually simple services are for the most part performed in an expeditious and satisfactory manner. In our judgment this is not the practice of law; but in so holding it is neither our intention nor purpose to modify the definition of the practice of law announced in the first paragraph of the syllabus of *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St., 23, 193 N. E., 650.

Of course, exceptional cases may arise from time to time where legal problems are involved in the presentation of claims, but it is the ordinary claim and not the exceptional one which now engages our attention. Anticipating the exceptional would hardly be practicable.

Administrative boards and commissions are common to both federal and state governments. There are many of them, and the Industrial Commission of Ohio is included in that category. Without entering into an extended discussion, let it be noted that the representation of others before such bodies has been determined many times not to constitute the practice of law, and they are conceded the power to promulgate rules governing the practice before them.

In the case of *Louisville & Nashville Rd. Co. v. Sloss-Sheffield Steel & Iron Co.* (C. C. A., 5), 295 F., 53, affirmed, 269 U. S., 217, 46 S. Ct., 73; 70 L. Ed., 242, the court had occasion to discuss the prerogatives of the Interstate Com-

merce Commission. At page 56 of the opinion, this language appears:

"The Commission is an administrative body. The validity of its proceedings is not dependent upon compliance with procedural rules as to pleading and practice which prevail in courts of law. It 'may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.'" Such language is appropriate to the Industrial Commission of Ohio, up to the point where a claim is first denied within the purview of Section 1465-90, General Code.

A consideration of that section brings us to a more difficult problem. It stipulates that where the Industrial Commission finds "it has no jurisdiction of the claim and has no authority thereby to inquire into the extent of disability or the amount of compensation, and denies the right of the claimant to receive compensation, or to continue to receive compensation for such reason, then the claimant may within thirty days after receipt of notice of such finding of the commission, file an application with the commission for a rehearing of his claim * * *."

The rehearing thus provided for presents a very difficult matter from the original hearing or investigation.

Continuing, Section 1465-90, General Code, recites: "Such hearing shall be had and the evidence for and against the allowance of the claim submitted as in the trial of civil actions. The commission shall pass upon the admissibility of evidence, but either party may at the time make objection and take exception to the rulings of the commission thereon, and if the commission refuses to admit any evidence, the party offering the same shall state the nature of such evidence and the matter which such party proposes to prove thereby, and such statement shall be made a part of the record of such rehearing. * * *"

What is commonly termed "an appeal" to the Common Pleas Court is given, for if upon rehearing the commission adheres to its finding "that it has no jurisdiction of the claim and no authority to inquire into the extent of disability or amount of compensation claimed, then the claimant, within sixty days after receipt of notice of such action of the commission, may file a petition in the common pleas court * * *."

"Within ten days after the filing of the answer the industrial commission shall certify to such court a transcript of the record of such rehearing, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in such fund upon the evidence contained in such record and no other evidence * * *."

Referring to the report of the governor's investigating committee on the Workmen's Compensation Act, under the date of December 31, 1934, we are in accord with the following observation embraced therein anent the rehearing under Section 1465-90:

"Since such cases must be prepared to conform to court procedure, and since under the law a representative of the Attorney General acts for the Industrial Commission in court hearings, it is highly important that from the outset of taking testimony on the applications competent and experienced legal talent be in charge, in order that all relevant and competent facts may be developed and appropriate objections interposed into the record as to all incompetent and irrelevant matters that may be attempted to be placed in the record."

In all fairness, it must be conceded that the preparation of a rehearing record should be in complete charge of an

attorney at law. It presents exactly the kind of work for which his training and experience peculiarly fit him. Such record constitutes the entire evidence upon which the merits or demerits of a claim can be determined by a court and jury. If a record be poorly and inexpertly prepared, the rights of interested parties may be seriously prejudiced. Its formation unquestionably comes within any well considered and complete definition of the practice of law.

We have given no extended consideration as to whether plaintiffs have pursued a proper remedy, for the cogent reason that defendants have failed to raise the question in any way.

However, this court has recognized the applicability of the writ of prohibition to the Industrial Commission. *State, ex rel. Wolf Run Coal Co., v. Industrial Commission;* 110 Ohio St., 487, 144 N. E., 272; *State, ex rel. Firestone Tire & Rubber Co., v. Duffy et al., Industrial Commission,* 114 Ohio St., 702, 152 N. E., 656.

Our conclusion is that appearances and practice before the Industrial Commission do not ordinarily or properly constitute the practice of law up to the time when a claimant first receives notice of the disallowance of his claim under Section 1465-90, General Code, and are subject to the regulation and control of the Industrial Commission as granted by statute. Thereafter, rehearing proceedings before the commission do constitute the practice of law and must be conducted exclusively and personally by an attorney or attorneys at law, duly admitted to practice, and the defendants are therefore prohibited from recognizing or entertaining representation, in the particular noted, by those failing to meet such qualifications.

The writ will be allowed in part as indicated.

Writ allowed in part.

WEYGANDT, C. J., STEPHENSON, WILLIAMS, JONES, MATTHIAS and DAY, JJ., concur.

REVISED CODE OF OHIO

§2505.45 Power of courts to make rules. (GC §12223-47)

The supreme court may make and publish rules with respect to the procedure in the supreme court not inconsistent with the laws of the state.

The several judges of the courts of common pleas and the courts of appeals shall make rules, not inconsistent with the laws of the state, for regulating the practice and conducting the business of their respective courts, which they shall submit to the supreme court. The supreme court may alter and amend such rules and make other rules necessary for regulating the proceedings in any court.

HISTORY: GC §12223-47; 116 v 104 (114), §1. Eff 10-1-53.

§4123.88 False representation or solicitation of authority. (GC §1465-112)

No person shall orally or in writing, directly or indirectly, or through any agent or other person fraudulently hold himself out or represent himself or his partners or associates as authorized by a claimant or employe to take charge of, or represent such claimant or employer in respect of, any claim or matter in connection therewith before the industrial commission, or in or before the department of industrial relations, or any representative thereof. No person shall directly or indirectly solicit authority, or pay authority, or accept or receive pay or anything of value or give anything of value to another person to solicit from another person for soliciting authority, from a claimant or employer to take charge of, or represent such claimant or employer in respect of, any claim which is or may

be filed with the commission. No person shall, without prior authority from a member of the commission, the claimant, or the employer, examine or directly or indirectly cause or employ another person to examine any claim file or any other file pertaining thereto. No person shall forge an authorization for the purpose of examining or cause another person to examine any such file. No employee of the commission, notwithstanding the provisions of section 4123.27 of the Revised Code, shall divulge any information in respect of any claim which is or may be filed with the commission to any person other than members of the commission or to the superior of such employee except upon authorization of a member of the commission or upon authorization of the claimant or employer. No person shall solicit or obtain any such information from any such employee without first having obtained an authorization thereof as provided in this section.

HISTORY: GC §1465-112; 114 v 789, §1; 124 v. 806 (822), §1. Eff 10-1-53.

§4705.03 Proceedings against attorney. (GC §1708)

Before an attorney at law is suspended or removed, or publicly or privately reprimanded, written charges must be filed against him, stating distinctly the grounds of complaint, and a copy thereof, certified by the clerk, under the seal of the court, served upon him. After such service, such attorney shall be allowed a reasonable time to collect and present testimony in his own defense, and he shall be heard by himself or counsel.

HISTORY: GC §1708; RS §563; S&C 92; 29 v 111, §4; 82 v 16, 26; 91 v 63; 94 v 390; 111 v 412. Eff 10-1-53.

§4705.04 Review of proceedings. (GC §1709)

In case of suspension or removal of an attorney at law by the court of common pleas, an appeal on questions of

law may be had to the court of appeals, and the sentence of either the court of common pleas or the court of appeals, may be reviewed on appeal on questions of law in the supreme court. If such suspended or removed attorney shall desire a modification of the decree of suspension or removal, he shall file a written motion therefore in the court which entered such decree.

HISTORY: GC §1709; S&C 92, 29 v 411, §4; 82 v 16, 26; 91 v 63; 94 v 390, 103 v 405 (418); 116 v 104 (127), §2. Eff 10-1-53.

Cross-References to Related Sections

See RC § 4705.05 which refers to this section.

§4705.08 Compensation for procurement of legal services prohibited.

No attorney or other person shall pay or receive any compensation or other consideration, or divide with or receive any portion of a fee, as an inducement or payment for solicitation or procurement of legal services consisting of prosecuting or defending a claim, cause of action, or criminal charge, whether such services are to be performed or such claim or cause of action is to be prosecuted or defended in this state or elsewhere. This section does not prohibit the division of fees between attorneys for services performed by them.

Any agreement made or contract of employment obtained in violation of this section is void and unenforceable.

§4705.02 Suspension or removal of attorney. (GC §1707)

The supreme court, court of appeals, or court of common pleas may suspend or remove an attorney at law from office or may give private or public reprimand to him as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude, or for conviction of a crime involving moral turpitude.

Such suspension or removal shall operate as a suspension or removal in all the courts of the state. The clerk of court upon such suspension or removal shall send a copy thereof to the supreme court, the court of appeals, and to the federal court of the district in which said attorney resided at the time of trial for such action as is warranted. Judges of such state courts are required to cause proceedings to be instituted against an attorney, when it comes to the knowledge of any judge or when brought to his knowledge by the bar association of the county in which such attorney practices that he may be guilty of any of the causes for suspension, removal or reprimand. 111 v 411. Eff 10-1-53.

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No. 330

In the

Supreme Court of the United States

OCTOBER TERM, 1956

On Appeal from the Supreme Court of the State of Ohio

KINGSTON ACHE,

Appellant,

vs.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

BRIEF FOR APPELLANT

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SUPREME LAW PRINTING AND PUBLISHING, INC., Columbus 15, Ohio

No. 259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

On Appeal from the Supreme Court of the State of Ohio

KENNETH AGEE,

Appellant,

vs.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

MOTION TO DISMISS

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Other Authorities Cited

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Ohio Revised Code—
Section 4705.03 7

MOTION TO DISMISS

Now comes the Columbus Bar Association, appellee in the above entitled case, and moves to dismiss this appeal on the grounds that no jurisdiction attaches for the following reasons:

A) the four questions presented by appellant were not timely or properly raised in the state court proceedings;

B) the four questions presented by appellant are so unsubstantial as to need no further argument.

ARGUMENT

The Four Questions Presented by Appellant Were Not Timely or Properly Raised in the State Court Proceedings.

Question 1

Appellant's question No. 1 contains his initial reference to the Fourteenth Amendment to the Constitution of the United States and the particular complaint of an abridgement of the privileges and immunities of a citizen of the United States. Nowhere in the state court proceedings do we find that he has framed a Federal question or called the attention of either the Board of Commissioners on Grievances and Discipline or the Supreme Court to any specific provisions of the Constitution of the United States.

While it is true that appellant previously raised the issue of the omission of the term "moral turpitude" from the definition of misconduct as set forth in Amended Rule XXVII of the Supreme Court of the State of Ohio, he did not do this within the framework of a Federal question, and in fact appellant made no mention of whether he was referring to the State or Federal Constitution. This Court has long followed the rule that allegations of unconstitutionality of a general nature are deemed to refer to the

constitution of the state in question, and, moreover, that to raise a Federal question the grounds for same must be called to the state court's attention with precision. *New York ex rel. Bryant v. Zimmerman*, 278 US 63 at 67-68, 49 S Ct 61, 73 L ed 184; *Bowe v. Scott*, 233 US 658 at 664-665, 34 S Ct 769, 58 L ed 1141.

Attached hereto as Appendix A are the objections which appellant made in the Supreme Court of Ohio to the findings and recommendations of the Board of Commissioners on Grievances and Discipline. Similarly, Appendix B is a reprint of appellant's application for re-hearing in the Supreme Court of Ohio. In neither the objections or the application for re-hearing does appellant point out a provision of the United States Constitution which was allegedly violated.

It is further noted that appellant's jurisdictional statement makes numerous references to constitutional questions raised in briefs filed with the Board of Commissioners and the Supreme Court of Ohio. Not only do these references fail to reveal that a Federal question was raised timely, properly, or with precision, but also this Court has held that briefs are not part of the record for the purpose of raising a Federal question. *Lynch v. N. Y. ex rel. Pierson*, 293 US 52 at 54, 55 S Ct 16, 79 L ed 191; *Live Oak Association v. Railroad Commission*, 269 US 354 at 357-358, 46 S Ct 149, 70 L ed 305; *Harding v. Illinois*, 196 US 78 at 84, 25 S Ct 176, 49 L ed 394.

Question 2

Appellant's second question really raises two questions which are alleged to be in violation of the Fourteenth Amendment of the Constitution of the United States. The first question is whether the substitution of a "written com-

plaint alleging misconduct" for "written charges" violates the due process clause. In objections four and five filed by appellant in the Supreme Court of Ohio we find the phrases due process and unconstitutional, but there is nothing to indicate that he intended to raise a Federal question, for the manner in which he now alleges the issues were raised was in the following words:

> "4. That the entire proceedings before the Panel deprived the Respondent of due process.
>
> "5. That the entire proceeding before the Panel was unconstitutional."

Such a blanket condemnation of the entire proceedings cannot as an afterthought be said to raise a substantial Federal question with the precision required to have it reviewed by this Court.

Upon the authorities cited above, it is submitted that these issues were neither timely nor properly raised.

The second subdivision of this question, dealing with the burden of proof required in disciplinary cases is likewise totally absent from the record unless we wish to say that by calling the entire proceedings unconstitutional a substantial Federal question was raised with the precision required for review by this Court.

Questions 3 and 4

The third question presented complains of a retroactive application of Canons 34 and 35. The fourth question claims that there was an absence of any person aggrieved. Questions three and four are alleged to be violations of the due process and the equal protection clauses of the Fourteenth Amendment, and, additionally, question three is allegedly in violation of Article I, Section 10, Clause 1 of the Constitution of the United States.

In *Oxley Stave Co. v. Butler County*, 166 US 648 at 655, 17 S Ct 709, 41 L ed 1149, this Court held:

> "* * * the jurisdiction of this court to re-examine the final judgment of the state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." See also, *Godchoux Co. v. Estopinal*, 251 US, 179 at 181; *Beck v. Washington*, 369 US 541, 8 L ed 2d 98, 82 S Ct 955, reh den, 370 US 965, 8 L ed 2d 834, 82 S Ct 1575.

It is submitted that appellant has not complied with the above quoted rule. Although it is not sufficient to raise a constitutional question by brief only, the sole place in which appellant specified a violation of any constitution was at page 24 of his brief before the Supreme Court of Ohio in which he stated:

> "While we realize that the constitutionality of Amended Rule XXVII has been passed upon, we would be remiss if we do not include our thinking that the Rule is unconstitutional * * * definitely as to application and also as it is written. It is the contention of the Respondent that the Rule and the creation of the Board of Commissioners on Grievances and Discipline is a violation of the guarantees afforded to citizens of a separation of powers of legislative and judicial branches of state government. We also submit that it is a violation of the Constitution of the State of Ohio, Article II, Section 1."

Otherwise, the Federal questions alleged to have been raised in the court below are simply vague allusions to some constitution without specifying whether it is the Ohio Constitution or the Federal Constitution, and it would strongly appear that the Federal questions now alleged to exist are mere afterthoughts, for in considering any con-

stitutional questions which did arise the Ohio Supreme Court held in this case (*Bar Assn. v. Agee*, 175 Ohio St., 443 at 444) as follows:

> "The respondent alleges that the proceedings before the panel were unconstitutional and deprived the respondent of due process. This issue was raised and rejected in *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St., 17. The subject was considered in detail in that case and merits no further consideration here."

The Court's attention is further called to the fact that the case of *Mahoning County Bar Assn. v. Franko*, 168 Ohio St., 17, dealt only with questions arising under the Ohio Constitution, and it was held as follows at page 25:

> "It is at once apparent that a finding by this court regarding the power of the General Assembly to enlarge upon a prohibition imposed by the Constitution is in no way connected with the power of this court to impose certain standards of conduct upon all members of the legal profession of this state as conditions to maintenance of their status as such members."

Moreover, this Court denied certiorari in that case. *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St. 17, Cert. den. 358 US 932.

The Four Questions Presented by Appellant are so Unsubstantial as to Need no Further Argument.

Appellant complains that the omission from Rule XXVII of the former requirement that moral turpitude be found as a condition precedent to disbarment has deprived him of a constitutional right. Appellee notes on page 10 of appellant's jurisdictional statement that the first statute cited, Section 563 of the Revised Statutes of Ohio, provided as early as 1885 that an attorney could be disbarred with the following causes:

> "* * * misconduct in office, conviction of a crime involving moral turpitude or unprofessional conduct involving moral turpitude * * * "

Although moral turpitude could be the basis for a disbarment under that statute, it is equally clear that "misconduct in office" standing alone was sufficient to justify a disbarment, and "misconduct in office" is a violation of the Canons of Professional Ethics.

Essentially what appellant is saying is that the Supreme Court of Ohio has no inherent power to disbar attorneys and to provide by rule the procedure for such disbarment. This argument has been made previously in *Cleveland Bar Assn. v. Pleasant*, 167 Ohio St., 325, Cert. den. 358 US, 842; *Mahoning County Bar Assn. v. Franko*, 168 Ohio St., 17, Cert. den. 358 US 932, and *Re McBride*, 164 Ohio St., 419, Cert. den. 351 US 965. Although this same issue was raised in each of these cases, it is noted that certiorari was denied in each, and we believe that it would not present a substantial question at this time even if it were timely and properly raised in the court below.

Review of cases from other states reveals that the Court's inherent jurisdiction to disbar, suspend, or otherwise discipline attorneys is well established. *State v. Mosher*, 128 Iowa 82, 103 NW, 105; *Lenihan v. Commonwealth*, 165 Ky. 93 176 SW, 948; *Re Ebbs*, 150 N. C. 44, 63 SE, 190; *Wolfe's Disbarment*, 288 Pa. 331, 135 A 732; 7 *American Jurisprudence 2d*, "Attorneys at Law," Sections 40 and 42.

In this connection we fail to understand the relevance of appellant's citation of *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 US 232, 1 L ed 2d 796, 77 S Ct 752. This case, as the caption implies, concerned an applicant to the bar and held that a state could only preclude such an applicant on grounds of moral turpitude, lack-

of proficiency in the law, or other valid reasons. An applicant for the bar, however, is not bound by the Canons of Professional Ethics, but once he has been admitted to the bar he is so bound, and consequently a violation of the canons will justify a disciplinary proceeding regardless of whether that violation involved moral turpitude.

Appellant next complains, at page 12, as follows:

> "In addition 'written charges' as required by Section 4705.03 of the Revised Code of Ohio, has been reduced to a 'complaint alleging misconduct', the requirements provided by the said Rule XXVII."

Section 8 of Rule XXVII provides as follows:

> "A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct of one, who shall be designated therein as the Respondent."

Frankly, we fail to perceive any distinction between the phrase "written charges," as used in Section 4705.03 of the Revised Code of Ohio, and the phrase "formal written complaint," as used in Section 8 of Rule XXVII. At best it might be designated as a distinction without a difference, but it is so slight as not to warrant further argument.

Appellant next criticizes the quantum of evidence required in a disciplinary proceeding. He cites in support of this contention *In re Chappel*, 12 Ohio Ops. 499, 3 NE 2d 393, which is an Ohio appellate court decision requiring that the evidence warranting disbarment must be "clear and convincing." He has further failed, however, to apprise this Court that *In re Chappel* was subsequently discussed by the Supreme Court of Ohio in *In re Lieberman*, 163 Ohio St. 35 at 42, prior to the adoption of Rule XXVII. The *Lieberman* case specifically rejected the reasoning of the *Chappel* case and held in its syllabus as follows:

> "The degree of proof required in a disbarment proceeding is a preponderance of the evidence."

Perhaps this would explain appellant's statement at page 13, "The question of the quantum of the evidence is not explicit in the judgment review of which is sought * * *," which we assume to mean that he is not seriously pressing this issue.

Appellant's third question alleges that he has been suspended from the practice of law by a rule of law which was retroactively applied to him and which is consequently an *ex post facto* law. The rationale here is that between the time of the decision of *Goodman v. Beall*, 130 Ohio St. 427, and the decision of *In re Brown, Weiss and Wohl*, 175 Ohio St. 149, both of which were cases involving the unauthorized practice of law, a layman could represent claimants in compensation cases before the Industrial Commission of Ohio. Appellant's disbarment hearing was held two months before the *Brown, Weiss and Wohl* case decided on July 10, 1963, that the practice before the Industrial Commission *for a fee* was the practice of law. Appellant then concludes that it was permissible for him to pay a lay compensation specialist $48,000 in 1961 for compensation cases referred to him. Such a conclusion overlooks the caveat to attorneys in *Goodman v. Beall*, 130 Ohio St. 427 at 430-431 (set out in the appendix to appellant's jurisdictional statement at page 53):

> "Since the inception of the Workmen's Compensation Act it has been common practice for laymen to assist an injured or diseased workman or his dependents in the submission of a claim. Often this is done as an accommodation by representatives of an organization to which a claimant may belong, and such usually simple services are for the most part performed in an expeditious and satisfactory manner. In our judg-

ment this is not the practice of law; *but in so holding it is neither our intention nor purpose to modify the definition of the practice of law announced in the first paragraph of the Syllabus of Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650." (Emphasis added)

In disposing of this contention, we can do no better than to quote the language of the Supreme Court of Ohio in the instant case (*Bar Assoc. v. Agee*, 175 Ohio St. 443 at 446):

> "Respondent contends that, since laymen were permitted to practice before the commission, a lawyer representing a claimant on an Industrial Commission case could ethically share his fee with a layman until the decision in the *Brown, Weiss and Wohl case*. This is a *non sequitur*.
>
> "Although it may be true that the prohibition in Canon 34 is limited to fees received for legal services, services to a claimant in an Industrial Commission case were always legal services when rendered by a lawyer. There are many areas in which personal services do not constitute the practice of law when done by a layman but which are the practice of law when performed by an attorney, *e. g.*, work in the fields of income tax and trademarks. The respondent seemed well aware that his work constituted legal services since he contracted with claimants in his name as an attorney. Authorizations from claimants were obtained in the name of 'Mr. Kenneth Agee, Attorney at Law.' He, therefore, could not ethically divide his fees for such services with a layman, even though the layman could have performed the same services."

Appellant's last contention is directed to Section 8 of Rule XXVII which reads as follows:

> "THE COMPLAINT, BY WHOM SIGNED. A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct of one, who shall be designated therein as the Respondent. Such complaint shall not be accepted for filing unless it is signed

by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint. The complaint may also, but need not, be signed by the person aggrieved."

Because the rule concludes with the sentence "The complaint may also, but need not, be signed by the person aggrieved," appellant concludes that this means that it must be signed by a person aggrieved. We cannot agree with this for the very basic reason that the Canons of Professional Ethics are designed to protect individuals, society in general, and the bench and bar from the conduct of an unethical practitioner. Thus under the canons there may be an individual that has been aggrieved who may make complaint to the bar association or the Board of Commissioners on Grievances and Discipline. In many instances, however, there will be no individual who is personally aggrieved but the bar association and society in general must be protected against unethical practices, and it is in these cases that the bar steps in to clean its own house before an individual is aggrieved. This is exactly the situation which we have at hand, and we know of no more appropriate description of the situation than the language of Justice Harlan in *Cohen v. Hurley*, 366 US 117 at 123-124, 6 L ed 2d 156 at 162, 81 S Ct 954:

"History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind: That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. Not only is the practice of such judicial investigations long-established, but the subject matter of the present investigation does not lack a rational basis. It is no less true than trite that lawyers must operate in a three-fold capacity as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes. It is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court, or that the 'payment of awards to persons bringing in legal business' is inconsistent with the personally disinterested position a lawyer should maintain."

We find no merit in appellant's contention that a bar association cannot endeavor to maintain professional standards and bring disciplinary actions prior to the time an individual is aggrieved; and from the fact that appellant has made no attempt to show wherein he was denied the equal protection of the law, we rather suspect that appellant does not believe that a substantial question exists here.

CONCLUSION

From the foregoing it is the position of appellee that appellant did not timely or properly raise a Federal question in the Supreme Court of Ohio with such preciseness that it was apparent that he intended to assert a Federal right. Certainly this was not apparent to the Supreme Court of Ohio, for it did not decide any Federal issues. Appellant's jurisdictional statement asserting Federal questions might be characterized as merely an afterthought to the real issues which were decided against him. In addition, appellant has not presented any question in his jurisdictional statement which is substantial or which has not been raised previously in this Court in cases pending on certiorari from the Supreme Court of the State of Ohio. For these reasons the appeal should be dismissed.

Respectfully submitted,

S. Noel Melvin,
Counsel for Appellee,
J. Raymond Prohaska,
Of Counsel for Appellee,
James C. Justice,
Of Counsel for Appellee.

APPENDIX A

IN THE SUPREME COURT OF OHIO

D. D. No. 48

COLUMBUS BAR ASSOCIATION,
Relator,

vs.

KENNETH AGEE,
Respondent.

RESPONDENT'S OBJECTIONS TO FINDINGS AND RECOMMENDATIONS OF BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

Now comes the Respondent herein and respectfully files his Objections to the Findings and Recommendations of the Board of Commissioners on Grievances and Discipline, certified to this Court on May 14, 1963, to the confirmation of said Report, and to the entry of any disciplinary order in this case. The grounds for said Objections are as follows:

1. That the Findings and Conclusions of the Board of Commissioners on Grievances and Discipline to the effect that the Respondent has been guilty of misconduct within the meaning of Paragraph 5 of Rule XXVII of the Supreme Court of Ohio are not supported by the evidence.
2. That the Findings and Conclusions of the Board of Commissioners on Grievances and Discipline are not supported by the law.
3. That the Respondent was not afforded a fair legal hearing before the Panel inasmuch as the Panel refused to rule upon certain requests and motions made by the Respondent.
4. That the entire proceedings before the Panel deprived this Respondent of due process.

5. That the entire proceedings before the Panel was unconstitutional.
6. That the Board of Commissioners on Grievances and Discipline never examined the record to determine the sufficiency of the charges and evidence against the Respondent.
7. That the recommendations of such Board to the Supreme Court recommending that the Respondent, Kenneth Agee, be suspended indefinitely from the practice of law are not justified or supported by the evidence, and are unduly harsh and severe.

/s/ George E. Tyack,
Eight East Broad Street, Columbus 15, Ohio,
and
/s/ Harry B. Reese,
16 East Broadway, Wellston, Ohio,
Attorneys for Respondent.

APPENDIX B

IN THE SUPREME COURT OF OHIO

COLUMBUS BAR ASSOCIATION,
Relator,

vs.

KENNETH AGEE,
Respondent.
D. D. No. 48

APPLICATION FOR REHEARING

[Filed February 4, 1964]

Now comes the Respondent herein, Kenneth Agee, and makes application for rehearing from the per curiam decision of this Court overruling the objections of Respondent to the findings of the Board of Commissioners on Grievances and Discipline and approving the recommendations of the Board that Respondent be suspended indefinitely from the practice of law in the State of Ohio.

Respondent respectfully states that the opinion herein includes conclusions which were not supported by the evidence in that there is reference to a Portsmouth office which is not borne out by the facts as the record indicates. There is also reference to a private telephone line which is contrary to the evidence inasmuch as the telephone appearing on the stationery of the Respondent actually is service to Columbus and rings in Columbus and not in any number in Portsmouth.

Respondent respectfully states that this application should be granted because of the obvious misunderstanding of the testimony in that prior to the decisions made in *Brown, Weiss and Wohl* if this matter was the practice of

law, it was the type of "law" that was authorized to be practiced by laymen in that the Boards permitted and licenses laymen to practice.

Further, Respondent feels that the Court misconstrued the relationship with Mr. Sullens who was an independent lay practitioner and, by and large, the clients going to the office of Mr. Sullens were the clients of Mr. Sullens since Mr. Sullens was authorized to do all of the necessary functions to process their claims.

Respondent further feels that there are conclusions drawn in the closing portion of the decisions concerning "funneling" which are not supported by the record.

Respondent further feels that his constitutional rights have been infringed upon in that the order of the Court actually deprives him of any right to practice before any boards, commissions, etc. even though lay persons are permitted to practice before many of these boards and commissions. Under the terms of the suspension ordered, Respondent would be deprived of rights as an individual entirely apart from any rights which he would have as an attorney.

WHEREFORE, Respondent respectfully prays that this Honorable Court allow the within application for rehearing for the reasons set forth.

Respectfully Submitted,

/s/ George E. Tyack,
Attorney for Respondent.

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No. 269

IN THE

Supreme Court of the United States

October Term, 1964

On Appeal from the Supreme Court of the State of Ohio

KENNETH AGEE,

Appellant,

v.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS

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Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

No. 259

IN THE

Supreme Court of the United States

October Term, 1964

On Appeal from the Supreme Court of the State of Ohio

KENNETH AGEE,

Appellant,

v.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS

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Attorneys for Appellee.

BRIEF OPPOSING MOTION TO DISMISS

There was but one court of the State in which this cause was cognizable, the Supreme Court of the State of Ohio; in that Court, the questions presented were raised and considered but were decided contrary to the demands of the provisions of the Constitution of the United States expounded and relied upon.

The four questions presented were raised properly, adequately and in timely fashion in the proceedings in the Supreme Court of the State of Ohio. While, to show ample presentation of the appellant's contentions in this controversy the said Panel of three Commissioners and the said Board of Commissioners on Grievances and Discipline were treated as courts of the State of Ohio in the Jurisdictional Statement herein, actually they are not courts of the State. Sections 1 and 15 of Article IV of the Constitution of the State of Ohio provide that the courts of the State of Ohio are those created by that document and those created by the Legislature of the State of Ohio.

A disciplinary proceeding may only become a matter cognizable by a court of the State of Ohio in the event that the Board of Commissioners should determine that the discipline to be imposed is to be that of public reprimand, indefinite suspension from the practice of law, or disbarment. In such event, the disciplinary proceeding becomes cognizable in but one court of the State of Ohio, the Supreme Court of the State of Ohio, upon a "final certified report of such proceedings, including its findings of fact and recommendations," the transcript of the testimony and a statement of expenses. (Section 15 of Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio). Thereafter, under Section 17 of said Rule XXVII, the party being subjected to discipline has a single opportunity to state his contentions, his defer

in a court of the State of Ohio. This statement or pleading is described as, "Objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report upon which said order to show cause was issued." Said Section 17 directs that the grounds of objections be set forth therein and that there be filed also a brief in support of such objections, proof of service and copies in sufficient number. In final analysis, when resort is had to the pleading described to show that the questions presented were raised properly, in timely fashion, and adequately, claims based on such decisions as those cited by appellee in its Motion to Dismiss are not at all in point. The decision, review of which is sought, rejected the respondent's assertion of unconstitutionality in the proceedings in question by stating in a *per curiam* opinion that constitutionality of the first two of the questions presented herein had been decided in *Mahoning County Bar Association* v. *Franko*, (1958) 168 O. S. 17, in which the decision was rested on *Cleveland Bar Association* v. *Pleasant*, 167 O. S. 325, which held at page 334,

> "* * * the disciplining of those who have been admitted to the practice are matters which come within the inherent powers of the judicial branch of the government, and that, although this court recognizes that the legislative branch may by statute provide standards and qualifications for admission to the bar and methods for the initiation and conduct of proceedings to disbar, suspend, or otherwise discipline attorneys for specified causes, such legislation is to be interpreted as an aid to and not as a limitation on the power of the judicial branch in these respects."

Thereby it is made clear that appellant's assertion that the disciplinary proceedings under Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio have been made to supersede the provisions of law

contained in Sections 4705.02 and 4705.03 of the Revised Code of the State of Ohio is valid and is, moreover, sustained by the appellee's contention. Questions 1 and 2 of the questions presented by the Jurisdictional Statement herein are brought up squarely before the Supreme Court of the United States for consideration as to whether the review sought should be granted. But for the decision as to the constitutionality of said Rule XXVII, as stated in *Cleveland Bar Association v. Pleasant, supra*, the matters set forth in the third and fourth of the questions so presented could not have occurred, so that they, too, have been brought up squarely for consideration. Appelee's claims that the questions presented were inadequately or improperly raised in the courts of the State of Ohio are without application to the facts of the case at bar.

Appellee's contentions reveal that the questions presented are, indeed, substantial.

At pages 6 and 7 of the Motion to Dismiss herein, appellee has contended that the comparison of *Schware* v. *Board of Law Examiners*, 353 U. S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752, is not understood. *Schware* held that admission to the practice of law could not be denied, except for guilt of moral turpitude, lack of proficiency in the law, or other valid reasons. By this contention, appellee discloses an odd notion that the Canons of Professional Ethics provide not so much standards of conduct as snares, hence the language,

> "• • • and consequently a violation of the canons will *justify* a disciplinary proceeding regardless of whether that violation involved moral turpitude." (emphasis mine)

Of course a violation will justify a disciplinary proceeding, but where there is a bare violation of a Canon of Professional Ethics as distinguished from a violation, or other

conduct, involving moral turpitude, a difference can, and should be made in the severity of the discipline imposed. In *Schware*, itself, and in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, this Court felt otherwise, that admission to the practice of law and disbarment, or indefinite suspension from the practice of law, are comparable in that, in either case, there must be valid reasons for the action taken. *In re Schlesinger*, 404 Pa. 584, 172 A2d 835, July 18, 1961, Charles Alvin Jones, Chief Justice of the Supreme Court of Pennsylvania, four Justices concurring, thought the two situations were at least comparable, and is so doing, used the words, at p. 843,

> "Since the requirements of due process prohibit a State from denying an applicant the opportunity to qualify for the practice of law because of membership in the Communist Party, *a fortiori*, should the requirequirements of due process prohibit a State from disbarring an attorney because of his membership in the Communist Party particularly when limited to a time during which the Party was a legally recognized political party in the State."

Clearly there must be valid reasons for disciplinary proceedings, and the severity of the discipline imposed must bear a rational relation to the offense. The Canons may not be corrupted from their purpose and thereby used as a snare.

The Motion to Dismiss reveals another odd notion that, citing an early statute of the State of Ohio, the causes for the discipline of an attorney at law are more a tool or a weapon than, in the statutes, grounds for disciplinary proceedings. Thus appellee has made its contention in the following words at the final sentence at page 5 of said Motion,

> "• • • an attorney *could* be disbarred *with* the following causes: • • •" (emphasis mine)

The statutes have used the expression, "*for* misconduct or unprofessional conduct in office involving moral turpitude, or *for* conviction of a crime involving moral turpitude." (emphasis mine)

Finally, comparison is made of the appellant herein to the situation presented by *Cohen* v. *Hurley*, 366 U. S. 117, 6 L. Ed. 2d 156, 81 S. Ct. 954, at page 10 of the Motion to Dismiss on the question of whether there is a person aggrieved, which is really merely, again, a question of severity of discipline. In *Cohen* v. *Hurley*, a rule of the Second Department of the State of New York required that contingent fee agreements and statements of how an attorney at law who files five or more of them in any year came to be retained must be filed. The accused, Cohen, refused to produce his records on inquiry by the judge concerned and thereby raised a question of his right to avail himself of the privilege against self-incrimination. While there can be no disagreement with investigation of the conduct of attorneys at law by the organized Bar, *Cohen* v. *Hurley* proceeded upon the accused's refusal to reveal, as required by rule of court, just what his suspect operations had been. For that refusal he was severly disciplined. In the judgment, review of which is sought, the appellant concealed nothing, and the gravamen of the offense relied upon was not, under the law of the State of Ohio, at the times on which the complaints are based, defined at all as an offense.

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No. 259

IN THE

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OCTOBER TERM, 1964

On Appeal from the Supreme Court of the State of Ohio

KENNETH AGEE,

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vs.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

PETITION FOR REHEARING AFTER DISMISSAL OF APPEAL FOR WANT OF JURISDICTION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 259

KENNETH AGEE,

Appellant,

vs.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

PETITION FOR REHEARING AFTER DISMISSAL OF APPEAL FOR WANT OF JURISDICTION

Appellant respectfully prays for a rehearing and for a reversal of the order herein of October 12, 1964, whereby the appeal was dismissed for want of jurisdiction, and the papers being treated as a petition for writ of certiorari, certiorari was denied.

THE PROCEEDINGS BELOW

On July 28, 1962, a complaint was filed with the Board of Commissioners on Grievances and Discipline for the State of Ohio which alleged that the respondent therein named, appellant herein, had been guilty of misconduct as defined by Section 5 of Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio. Appellant's motion to make definite and certain was overruled. Trial was had upon five separate allegations of appellant's misconduct, viz.:

1. Solicitations of professional employment.
2. Maintenance of an association with persons not admitted to the practice of law, with apportionment of fees with such persons.
3. Delegation of legal responsibility to appellant's employees who had not been admitted to the practice of law.
4. Maintenance of relations with persons not admitted to the practice of law, permitting exploitation of appellant's professional status by such persons.
5. Distribution of cards asserted to have constituted advertising.

The foregoing charges are a part of the record herein and are set out at greater length at pp. 6 and 7 of the Jurisdictional Statement herein.

Trial in the form of an evidentiary hearing was had upon the issues joined by appellant's general denial before a Panel of three Commissioners. (Section 10 of said Rule XXVII) The matter proceeded to review, upon the said Panel's finding of grounds for indefinite suspension of appellant from the practice of law, before the entire Board of Commissioners on Grievances and Discipline. (Section 14 of said Rule XXVII) The said Board filed, on May 13, 1963, its Findings of Facts, Conclusions and Recommendation in the Supreme Court of the State of Ohio. (Section 15 of said Rule XXVII) On January 29, 1964, after compliance with Sections 16 through 18, inclusive, of said Rule XXVII, the Supreme Court of the State of Ohio entered the judgment from which this appeal has been taken. Said judgment confirmed the report of the said Board of Commissioners and ordered the appellant herein suspended indefinitely from the practice of law in the State of Ohio. Application for rehearing of said judgment was denied by order of the Supreme Court of the State of Ohio on February 26, 1964.

Notice of appeal was filed in the Supreme Court of the State of Ohio on March 9, 1964, and on March 11, 1964, the Supreme Court of the State of Ohio stayed execution of the judgment appealed from pending final disposition of the appeal.

The said judgment of the Supreme Court of the State of Ohio is reported at 175 Ohio State Reports at pages 443 to 447, inclusive, and is set out in full in the Appendix to the Jurisdictional Statement filed herein. The notice given in accordance with Section 19 of the said Rule XXVII appears at page 130 of the Ohio Bar of February 10, 1964. The *Ohio Bar* is the publication of the Ohio State Bar Association. Defectively reproduced in the Appendix to the Jurisdictional Statement filed herein, said notice is set out fully and correctly immediately below.

"KENNETH W. (sic) AGEE AND STANLEY R. JURUS, JR., INDEFINITELY SUSPENDED FROM PRACTICE"

"Kenneth W. (sic) Agee and Stanley R. Jurus, Jr., both of Columbus, were definitely suspended from the practice of law by the Supreme Court of Ohio on January 29, 1964, for violations of the Canons of Professional Ethics.

"Recommendations of the suspensions were made by the Court's Board of Commissioners on Grievances and Discipline following hearings on complaints filed by the Columbus Bar Association.

"In the Agee matter the Court held that services to a claimant in an Industrial Commission case were always legal services when rendered by a lawyer, and that respondent could not ethically divide his fees for such services with a layman, even though the layman could have performed the same services.

"In the Jurus matter the Court found that respondent had paid laymen for soliciting Industrial Commission claimants on his behalf and that he had destroyed his files in several instances because affidavits had been

filed with the Industrial Commission charging him with solicitation.

"(This notice given in accordance with Section 19 of Rule 27 of the Supreme Court of Ohio.)"

On May 8, 1964, an order was made and entered in the Supreme Court of the United States by which the time within which to docket the case and file the record on appeal was extended to, and to include, July 7, 1964. On or before said date, the Jurisdictional Statement was filed herein, the record on appeal had been filed, and the case was docketed.

The petition for rehearing is filed under favor of jurisdiction conferred by Section 1257 (2) and (3) of Title 28 of the United States Code and by Rule 58 (1) of the Revised Rules of the Supreme Court of the United States to review on appeal from, or by writ of certiorari to, the Supreme Court of the State of Ohio said judgment of January 29, 1964, and said order of February 26, 1964.

GROUNDS UPON WHICH PETITION FOR REHEARING IS BASED

I. It was pointed out by the Jurisdictional Statement herein that retroactive effect had been given the rule pronounced in the *Unauthorized Practice of Law Committee of Cuyahoga County, Ohio* v. *Brown, Weiss and Wohl, et al.*, 175 O. S. 149, 192 N. E. 2d 54, decided July 10, 1963, as *Brown, Weiss and Wohl* v. *The Unauthorized Practice of Law Committee of Cuyahoga County, Ohio*, 84 S. Ct. 1136, certiorari denied, April 6, 1964; rehearing denied, 84 S. Ct. 1332, May 18, 1964. At page 130 of the *Ohio Bar* for February 10, 1964, by the notice of indefinite suspension of appellant from the practice of law in Ohio, quoted *supra*, it is made clear that the Columbus Bar Association knew,

on and before the initiation on July 28, 1962, of the disciplinary proceedings herein, twenty-nine days following the commencement of the disciplinary proceedings, June 29, 1962, in the *Brown, Weiss and Wohl* matter, *supra*., that the judgment therein would support the disciplinary proceedings commenced July 28, 1962, against the appellant herein. This conclusion is supported and borne out by the words of the notice set out above to the effect that services to a claimant in an Industrial Commission matter would be classified as the practice of law, overruling to that extent *Goodman* v. *Beall*, 130 O. S. 427, 200 N. E. 470, when that decision was not superseded until July 10, 1963, as has been already stated.

The attorney at law in the State of Ohio who is subjected to such machinations is denied his rights under the due process clause and the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States. The court of final resort in the circumstances must be the Supreme Court of the United States. Every forfeiture of anything of value possessed where the forfeiture is compelled and imposed by violation of the limitations imposed upon State action by Article I, Section 10, clause 1 of the Constitution of the United States constitutes a certain and complete denial of a Federal Constitutional right to remedy which the Supreme Court of the United States will grant appropriate relief.

II. The question of that which is the practice of law has been evaded, has not been decided upon any analysis whatever, or has been answered so evasively as, by its very illogic, to do violence to Federal Constitutional rights. The judgment appealed from states, after citing *Goodman* v. *Beall*, 130 O. S. 427, that, though laymen were permitted to practice before the Industrial Commission until the

said judgment in *Brown, Weiss and Wohl, supra.*, decided July 10, 1963, that circumstances is no defense to the charges of misconduct in the form of violation of certain of the Canons of Professional Ethics which prohibit the apportionment of fees with persons not admitted to the practice of law upon any basis whatsoever. But it is impossible judicially and logically to make of the practice complained of an offense against the Canons of Professional Ethics on the part of the appellant, punishable by the extreme penalty of indefinite suspension from the practice of law when the opinion itself recognizes that, prior to July 10, 1963, persons not admitted to the practice of law could engage in such representation and recognizes that appellant merely acted as custom, usage and the law permitted him, and all others so inclined to act; that it is merely for the reason that appellant is an attorney at law that he may be disciplined. In final analysis, appellant was disciplined by the indefinite suspension from the practice of law for the reason, solely, that the said Canons of Professional Ethics can be made to justify the discipline, severely, of an attorney at law for misconduct although the misconduct charged was a universal practice, engaged in by lawyers and persons not admited to the practice of law, alike.

III. The Jurisdictional Statement herein asserted that the discipline of an attorney at law under Rule of the Supreme Court of the State of Ohio, without regard to the statutory provisions set out in Section 4705.02 of the Revised Code of Ohio, was a denial of due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States by reason of the elimination of the requirement that there be present in the misconduct charged, if the discipline is to

be severe, i. e., to go beyond private reprimand, the ingredient of moral turpitude. The Motion to Dismiss filed herein contained that statement at page 7 thereof,

> ". . . and consequently a violation of the canons will justify a disciplinary proceeding regardless of whether that violation involved moral turpitude."

Again those who bring the disciplinary proceedings were in position to anticipate rules, applications of rules and changes in rules to be applied to an attorney at law in disciplinary proceedings. On March 11, 1964, Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio, the day on which the stay of execution was granted herein, was amended and became Rule XVIII of the said Rules of Practice. Section 5 (a) of said amended Rule XVIII now provides,

> ". . . Misconduct shall mean any violation of any provision of the oath of office taken upon admission to the practice of law, in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude."

The provisions of Section 6 of said amended Rule XVIII of the Rules of Practice of the Supreme Court of the State of Ohio are essentially unchanged and thus authorize disciplinary proceedings which may permit indefinite suspension of an attorney at law, or his disbarment, or a public reprimand, or a private reprimand upon a finding that he has been guilty of misconduct. But the first two of the foregoing permissible and authorized penalties constitute forfeitures and deprivations of the right to earn a livelihood, both of which are protected by the Fourteenth Amendment to the Constitution of the United States. The lesser pen-

alties of reprimand, public or private do not, of course, constitute deprivations of the right to earn a livelihood, nor does either constitute a forfeiture. It is our wish to formulate and to draw attention to the great difference between the two types of penalty. It is urged that, where the ingredient of moral turpitude is absent from the misconduct found, if misconduct is found, the severer penalties ought not, in justice, be applied. If the severer penalties are to be applied the authorities carrying out the disciplinary proceedings should properly be required to proceed under the Statute (Section 4705.02 of the Revised Code). The proceedings under the said Rule XXVII (now amended, Rule XVIII) should be limited to the penalties of reprimand, for otherwise Federal Constitutional rights are violated. It is desired also to point up the *ex post facto* effect, also here complained of and deplored and relief against the same asked, of the application of the concept of misconduct *sans* moral turpitude in the proceedings herein when it was not until after the proceedings that, by the provisions of the Rule proceeded under (former Rule XXVII) that moral turpitude ceased to be a requirement to disciplinary proceedings.

CONCLUSION

The violations, offenses, or the misconduct upon which the disciplinary proceedings herein were brought on July 28, 1962, on which the said Board of Commissioners acted, May 13, 1963, received their formulation as offenses, as misconduct only on July 10, 1963. The definition of misconduct which does not require that there be moral turpitude therein as the grounds for the more severe penalties did not receive formulation until after the disciplinary proceedings had been concluded in the Supreme Court of

the State of Ohio. It is unconscionable that a citizen should be thus deprived of privileges and immunities by State action.

It is respectfully urged that the extreme unfairness of the penalty of indefinite suspension from the practice of law upon *ex post facto* condemnation of conduct, in that the conduct was not disapproved until after the dates of commission of the acts considered misconduct in and by the judgment appealed from should be recognized as such unfairness. It is urged that the unfairness be corrected by the Supreme Court of the United States by the exercise of its jurisdiction to review the said judgment on appeal.

Respectfully submitted,

GEORGE E. TYACK,
ALEXANDER H. MARTIN, JR.,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

It is hereby certified that the above petition for rehearing is presented in good faith and not for delay.

ALEXANDER H. MARTIN, JR.,
GEORGE E. TYACK,
Attorneys for Appellant.

Dated: November 4, 1964
Columbus, Ohio

CERTIFICATE OF SERVICE

I, George E. Tyack, and I, Alexander H. Martin, Jr., attorneys for the appellant herein, each a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of November, 1964, we served copies of the foregoing Petition for Rehearing after Dismissal of Appeal for want of jurisdiction upon the Columbus Bar Association, the appellee herein, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, to appellee's attorneys of record as follows:

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